

**C. Draft Revised Guidance For Investigating Title VI Administrative Complaints  
Challenging Permits  
(Draft Revised Investigations Guidance)**

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## I. INTRODUCTION

### A. Purpose of the Revised Investigation Guidance

The *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)* is intended to provide a framework for the United States Environmental Protection Agency's (EPA or Agency) Office of Civil Rights (OCR) to process complaints filed under Title VI of the Civil Rights Act of 1964, as amended (Title VI),<sup>1</sup> and EPA's Title VI implementing regulations<sup>2</sup> alleging discriminatory effects resulting from the issuance of pollution control permits<sup>3</sup> by recipients of EPA financial assistance.

### B. Title VI of the Civil Rights Act of 1964, as Amended

The goal of the Civil Rights Act of 1964 is to eliminate discrimination in several areas of American society.<sup>4</sup> The Act prohibits discrimination in public accommodations (Title II); segregation in public facilities (Title III); segregation in public schools (Title IV); and discrimination in employment (Title VII).<sup>5</sup> Title VI of the Act, which prohibits discrimination on the basis of race, color, and national origin in all Federally-assisted programs and activities, applies to the recipients of an estimated \$900 billion in Federal assistance distributed annually by approximately 27 Federal agencies.<sup>6</sup> When submitting the Civil Rights Act to Congress, President Kennedy stated that "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion, which encourages, entrenches, subsidizes, or results in racial discrimination."<sup>7</sup>

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<sup>1</sup> 42 U.S.C. 2000d to 2000d-7.

<sup>2</sup> 40 CFR part 7.

<sup>3</sup> The underlined terms are defined or explained in the attached Glossary.

<sup>4</sup> See, e.g., 110 Cong. Rec. 7062 (1964) ("[T]he purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination.") (statement of Sen. Pastore).

<sup>5</sup> Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

<sup>6</sup> U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, p.12 (June 1996) [hereinafter *Federal Title VI Enforcement*].

<sup>7</sup> H.R. Doc. No. 124, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S.C.C.A.N. 1534.

Title VI itself prohibits intentional discrimination.<sup>8</sup> In addition, the Supreme Court has stated that Title VI authorizes agencies to adopt implementing regulations that also prohibit discriminatory effects.<sup>9</sup> This is often referred to as reaching actions that have an unjustified adverse disparate impact. EPA in 1973 promulgated regulations that implement Title VI and revised them in 1984.<sup>10</sup> Under EPA's Title VI implementing regulations, agencies receiving EPA financial assistance are prohibited, among other things, from using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin."<sup>11</sup> As applied to the permitting process, recipients of EPA financial assistance may not issue permits that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin.

### C. Scope of Guidance

While this guidance is directed at the processing of discriminatory *effects* allegations, Title VI complaints may also allege discriminatory *intent* in the context of environmental permitting. Such complaints generally will be investigated by OCR under Title VI, EPA's Title VI regulations, and applicable intentional discrimination case law. Moreover, even for allegations of discriminatory effects, this document is not intended to comprehensively address every scenario that may arise in the interaction between Title VI, EPA's Title VI regulations, and environmental permitting.<sup>12</sup> Given the infinite number of possible permutations of facts, allegations, and circumstances, such an approach is infeasible. Instead, this guidance provides a

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<sup>8</sup> *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 589 (1983).

<sup>9</sup> See *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); *Guardians Ass'n*, 463 U.S. at 589-93.

<sup>10</sup> 38 FR 17968 (1973), as amended by 49 FR 1656 (1984) (codified at 40 CFR part 7).

<sup>11</sup> 40 CFR 7.35(b).

<sup>12</sup> Title VI "delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985). In addition, DOJ, which is charged with coordinating the Federal government's Title VI work, Executive Order 12250, 45 FR 72995 (1980), issued regulations that provide, in part, that "Federal agencies shall publish Title VI guidelines for each type of program to which they extend financial assistance." 28 CFR 42.404(a). Furthermore, Executive Order 12250 requires agencies to issue appropriate implementing directives in the form of policy guidance or regulations that are consistent with requirements prescribed by the Attorney General. Pursuant to that authority, EPA is issuing the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance*.

detailed framework explaining how OCR intends to process and investigate allegations about discriminatory effects resulting from environmental permitting decisions. In particular, OCR generally expects to use this guidance for complaints involving allegations related to environmental permits, such as Clean Air Act<sup>13</sup> permits, Clean Water Act<sup>14</sup> discharge permits, Safe Drinking Water Act<sup>15</sup> permits, underground injection<sup>16</sup> permits, and Resource Conservation and Recovery Act<sup>17</sup> permits for treatment, storage, and disposal.<sup>18</sup>

The types of allegations that complainants have identified in previous complaints span a wide range, and may involve public participation, as well as adverse disparate impacts from the issuance of permits. Some are focused narrowly on the impacts from a single permitted activity or facility, while others have identified concerns with groups of similar facilities (*e.g.*, all waste disposal sites in an area), or the combined impacts of facilities and other sources in a particular area (*e.g.*, major permitted sources together with other stationary, mobile, or non-point sources). In some cases, allegations suggest that the recipient's permitting action may be part of a discriminatory pattern of decision-making for certain types of facilities (*e.g.*, hazardous waste landfills throughout a state). The nature of each of the allegations accepted for investigation in a particular complaint will generally form the basis for the scope of the investigation, which is further described in Section VI of this document.

Application of Title VI to issues other than environmental permitting, such as allegations concerning enforcement-related matters and public participation, will be addressed in future internal EPA guidance documents, as appropriate. Once that further guidance is available, complaints involving such allegations will be addressed under both EPA's Title VI regulations, which provide a general process for investigation of complaints, and that guidance. Until that time, such allegations will be addressed under the regulations.

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<sup>13</sup> Clean Air Act, 42 U.S.C. 7401 to 7671q.

<sup>14</sup> Federal Water Pollution Control Act, 33 U.S.C. 1251 to 1387.

<sup>15</sup> Safe Drinking Water Act, 42 U.S.C. 300f to 300j-26.

<sup>16</sup> Underground injections are regulated pursuant to the Safe Drinking Water Act.

<sup>17</sup> Resource Conservation and Recovery Act, 42 U.S.C. 6901 to 6992k.

<sup>18</sup> Use permits, such as those issued for pesticides, have some similarities to the permits listed above. OCR may use this guidance for complaints involving use permits if appropriate for the allegations and facts. For example, if a complaint alleged discriminatory effects from the application of a state-registered pesticide in a particular location, this guidance could be relevant. For investigations about such allegations, the term "permitted activity" would substitute for "source" in this guidance.

This guidance does not discuss in detail specific remedies for violations of Title VI or EPA's implementing regulations because remedies tend to be case-specific. Nonetheless, it should be noted at the outset that Title VI provides a variety of options in the event that EPA finds a recipient in violation of the statute or regulations. The primary administrative remedy described in the regulations involves the termination of EPA assistance to the recipient.<sup>19</sup> Alternatively, EPA may use other means authorized by law to obtain compliance (*e.g.*, referral to the Department of Justice (DOJ) for judicial enforcement).<sup>20</sup> However, as noted elsewhere in this document, EPA encourages the use of informal resolution to address Title VI complaints whenever possible.

It will likely be a rare situation where the permit that triggered the complaint is the sole reason discriminatory effects exist. EPA believes that cooperative efforts between permitting agencies and communities, whether or not in the context of Title VI-related programs, frequently offer the best means of dealing with such impacts, either before or after an investigation and finding. Efforts that focus on all contributions to the adverse disparate impact, not just from the permit at issue, will likely yield the most effective long-term solutions.

The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights or obligations enforceable by any party in litigation. EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented. This guidance may be revised to reflect changes in EPA's approach to implementing Title VI. In addition, this guidance does not alter in any way, a regulated entity's obligation to comply with applicable environmental laws. This guidance uses mandatory language when repeating explicit requirements found in EPA's Title VI regulations. The remainder of the guidance is discretionary and gives EPA flexibility to address the particularities of each complaint.

This guidance does not address complaints against EPA recipients that are Federally-recognized Indian tribes. That subject will be addressed by EPA in separate guidance because the applicability of Title VI to Federally-recognized Indian tribes involves unique issues of Federal Indian law.

#### **D. Coordination with Recipient Guidance**

Concurrently with this *Draft Revised Investigation Guidance*, EPA has issued *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)*, which provides a series of recommendations designed to improve existing programs of EPA recipients and reduce the likelihood or necessity for persons to file Title VI complaints. Implementation of the approaches suggested by the *Draft Recipient*

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<sup>19</sup> 40 CFR 7.130(a).

<sup>20</sup> *Id.*

*Guidance* should reduce the likelihood or necessity for communities to file Title VI administrative complaints with EPA alleging either: (1) discriminatory human health or environmental effects resulting from the issuance of permits; or (2) discrimination during the public participation process associated with the permit. The *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* documents were developed concurrently to ensure consistency. Furthermore, both Title VI guidance documents reference appropriate sections of the other and share an attached glossary.

The attached *Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance* document provides an additional discussion that addresses questions and concerns expressed in comments the Agency has received on the issue of Title VI guidance.

### **E. Principles for Implementing Title VI at EPA**

In implementing Title VI and developing this draft guidance, EPA adheres to the following principles<sup>21</sup>:

- All persons regardless of race, color, or national origin are entitled to a safe and healthful environment.
- Strong civil rights enforcement is essential.
- Enforcement of civil rights laws and environmental laws are complementary, and can be achieved in a manner consistent with sustainable economic development.
- Potential adverse disparate cumulative impacts from stressors should be assessed, and reduced or eliminated wherever possible.
- Research efforts by EPA and state and local environmental agencies into the nature and magnitude of exposures, stressor hazards, and risks are important and should be continued.
- Decreases in environmental impacts through applied pollution prevention and technological innovation should be encouraged to prevent, reduce, or eliminate adverse disparate impacts.
- Meaningful public participation early and throughout the decision-making process is critical to identify and resolve issues, and to assure proper consideration of public concerns.
- Early, preventive steps, whether under the auspices of state and local governments, in the context of voluntary initiatives by industry, or at the initiative of community advocates, are strongly encouraged to prevent potential Title VI violations and complaints.
- Use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved.

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<sup>21</sup> The guiding principles were adapted, in part, from the consensus principles identified by the Title VI Implementation Advisory Committee under EPA's National Advisory Council for Environmental Policy and Technology.

- Intergovernmental and innovative problem-solving provide the most comprehensive response to many concerns raised in Title VI complaints.

## **F. EPA's Nondiscrimination Responsibilities and Commitment**

Title VI is inapplicable to EPA actions, including EPA's issuance of permits, because it only applies to the programs and activities of recipients of Federal financial assistance, not to Federal agencies. The statute clearly excludes Federal agencies from its definition of "program or activity."<sup>22</sup> Nonetheless, EPA is committed to a policy of nondiscrimination in its own permitting programs. The equal protection guarantee in the Due Process Clause of the U. S. Constitution prohibits the Federal government from engaging in intentional discrimination.<sup>23</sup> Moreover, section 2-2 of Executive Order 12898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations,"<sup>24</sup> directs Federal agencies to ensure, in part, that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin. Consequently, EPA intends to conduct itself in a manner consistent with EPA's Title VI regulations.

## **II. FRAMEWORK FOR PROCESSING COMPLAINTS**

The following discussion describes how OCR intends to process Title VI complaints alleging discriminatory effects in the context of environmental permitting under EPA's Title VI implementing regulations.<sup>25</sup> In order to find a recipient in violation of the discriminatory effects standard in EPA's Title VI implementing regulations, OCR would determine whether the

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<sup>22</sup> 42 U.S.C. 2000d-4a.

<sup>23</sup> See U.S. Const. amend. V; see also *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

<sup>24</sup> Section 2-2 provides:

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Executive Order 12898, 59 FR 7629 (1994).

<sup>25</sup> 40 CFR part 7.



recipient's programs or activities have resulted in an unjustified adverse disparate impact.<sup>26</sup> In other words, OCR would assess whether the impact is both adverse and borne disproportionately by a group of persons based on race, color, or national origin,<sup>27</sup> and, if so, whether that impact is justified.<sup>28</sup> Assessing background sources of stressors allegedly contributing to discriminatory effects may be required to understand whether an adverse impact exists. However, in determining whether a recipient is in violation of Title VI or EPA's implementing regulations, the Agency expects to account for the adverse disparate impacts resulting from sources of stressors (*e.g.*, facilities), stressors (*e.g.*, chemicals or pathogens), and/or impacts (*e.g.*, risk of disease) within the recipient's authority.<sup>29</sup>

It is worth noting that it is possible to have a violation of Title VI or EPA's Title VI regulations based solely on discrimination in the procedural aspects of the permitting process (*e.g.*, public hearings, translations of documents) without a finding of discrimination in the substantive outcome of that process (*e.g.*, discriminatory human health or environmental effects). Likewise, it is possible to have a violation due to discriminatory human health or environmental effects without the presence of discrimination in the public participation process. It is also important to keep in mind that OCR is committed to pursuing informal resolution of Title VI complaints whenever possible because informal resolution will often lead to the most expeditious and effective outcome for all parties.<sup>30</sup>

### **A. Summary of Steps**

The steps that OCR will follow in complaint processing, as required by EPA's Title VI implementing regulations, are summarized below. These steps comport with the Federal government-wide standard for processing Title VI complaints.<sup>31</sup>

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<sup>26</sup> See 40 CFR 7.30, 7.35 (stating prohibitions against discrimination).

<sup>27</sup> See section VI (describing analysis for determining whether adverse disparate impact exists).

<sup>28</sup> See section VII (discussing justification).

<sup>29</sup> See section VI.B.2. (discussing scope of investigation).

<sup>30</sup> See section IV (discussing informal resolution).

<sup>31</sup> See 28 CFR 42.101 to 42.112 (DOJ's regulations implementing Title VI); 28 CFR 42.401 to 42.415 (DOJ's regulations for coordinating enforcement of Title VI); Executive Order 12250, 45 FR 72995 (1980) (Executive Order giving authority for coordinating Federal government's implementation of Title VI to DOJ).

## ***1. Acknowledgment of Complaint***

OCR will notify the complainant and the recipient in writing within five calendar days of the receipt of the complaint by EPA.<sup>32</sup> The recipient may then make a written submission responding to, rebutting, or denying the complaint within 30 calendar days of receiving the notification.<sup>33</sup>

## ***2. Acceptance for Investigation, Rejection, or Referral***

A complaint may contain more than one allegation. Each allegation that satisfies the jurisdictional criteria<sup>34</sup> will be accepted for investigation<sup>35</sup> within 20 calendar days of acknowledgment of its receipt, and the complainant and the recipient will be so notified.<sup>36</sup> In some cases, individual allegations within a single complaint may be treated differently. Some allegations may meet the jurisdictional criteria in EPA's implementing regulations, some may not, and still others may need further clarification.

If OCR does not accept an allegation for investigation, it will be rejected or referred to the appropriate Federal agency.<sup>37</sup> A referral is appropriate when it is evident that another Federal agency has jurisdiction over the subject matter.<sup>38</sup> If a complaint lacks sufficient information to determine whether any of the allegations contained in it should be accepted for investigation, OCR expects to request clarification. OCR will then decide whether to accept the allegation for investigation or to reject it within 20 calendar days of receiving the clarifying information. Failure of a complainant to respond within the specified time period OCR provides in its letter requesting clarification may result in rejection of those allegations.

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<sup>32</sup> 40 CFR 7.120(c).

<sup>33</sup> 40 CFR 7.120(d)(1)(iii).

<sup>34</sup> *See* section III.A. (describing jurisdictional criteria).

<sup>35</sup> "Acceptance" of a complaint merely indicates that the complainant has satisfied the basic jurisdictional criteria described in this section. The fact that OCR accepts a complaint for investigation does not in any way mean that a finding of noncompliance with Title VI will result. OCR must conduct an investigation to determine whether the recipient has complied with its Title VI responsibilities.

<sup>36</sup> 40 CFR 7.120(d)(1)(i), (ii).

<sup>37</sup> 40 CFR 7.120(d)(1).

<sup>38</sup> 40 CFR 7.125.

### 3. *Investigation*

OCR intends to promptly investigate all Title VI complaints that satisfy the jurisdictional criteria.<sup>39</sup> If a complaint is accepted for investigation, OCR will first attempt to resolve it informally.<sup>40</sup> If informal resolution fails, OCR will conduct a factual investigation to determine whether the permit(s) at issue will create an adverse disparate impact or add to an existing adverse disparate impact on persons based on race, color, or national origin. The investigation would consider any steps taken by the recipient to address Title VI concerns, as described in sections V and VI. Within 180 calendar days from the start of the complaint investigation, OCR will notify the recipient by certified mail of preliminary findings.<sup>41</sup> If, based on its investigation, OCR concludes that there is no discriminatory effect (*i.e.*, no unjustified adverse disparate impact), the complaint will be dismissed.<sup>42</sup> If OCR finds that there is a discriminatory effect, a preliminary finding of noncompliance with EPA's Title VI regulations will be made.<sup>43</sup>

### 4. *Preliminary Finding of Noncompliance*

If OCR makes a preliminary finding of noncompliance with the regulations, it will notify both the recipient and the complainant, and send a copy to the EPA grant award official (Award Official) and the Assistant Attorney General for Civil Rights.<sup>44</sup> OCR's notice generally will include recommendations for the recipient to achieve voluntary compliance and notification of the recipient's right to engage in voluntary compliance negotiations.<sup>45</sup> In determining whether a recipient is in violation of Title VI or EPA's implementing regulations, the Agency expects to assess whether the adverse disparate impact results from factors within the recipient's authority to consider as defined by applicable laws and regulations. The recipient may submit a written response, within 50 calendar days of receiving the preliminary finding, demonstrating that the

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<sup>39</sup> 40 CFR 7.120.

<sup>40</sup> 40 CFR 7.120(d)(2). *See also* section IV. (discussing informal resolution). Even in cases where informal resolution occurs, OCR may investigate the allegations to some extent to get a better understanding of the facts and circumstances.

<sup>41</sup> 40 CFR 7.115(c)(1).

<sup>42</sup> 40 CFR 7.120(g).

<sup>43</sup> 40 CFR 7.115(c).

<sup>44</sup> 40 CFR 7.115(c).

<sup>45</sup> *Id.*

preliminary findings are incorrect or that compliance may be achieved through steps other than those recommended by OCR.<sup>46</sup>

### ***5. Formal Finding of Noncompliance***

If, within 50 calendar days of receipt of the notice of preliminary finding, the recipient either fails to submit a written response or states that it does not agree to OCR's recommendations, OCR will issue a formal written determination of noncompliance to the recipient within 14 calendar days. A copy of the formal determination of noncompliance will also be sent to the Award Official and the Assistant Attorney General for Civil Rights.<sup>47</sup>

### ***6. Voluntary Compliance***

EPA's Title VI regulations provide that the recipient will have 10 calendar days from receipt of the formal determination of noncompliance within which to come into voluntary compliance.<sup>48</sup> If the recipient fails to meet this deadline, OCR must start procedures to deny, annul, suspend, or terminate EPA assistance, or may use any other means authorized by law to ensure compliance, including referring the matter to DOJ for litigation.<sup>49</sup>

### ***7. Hearing/Appeal Process***

Within 30 calendar days of receipt of the formal finding of noncompliance, the recipient must file a written answer and may request a hearing before an EPA administrative law judge (ALJ). Following the hearing and receipt of the ALJ's determination, the recipient may, within 30 calendar days, file its exceptions to that determination with the Administrator. The Administrator may elect to review the ALJ's determination. If the Administrator decides not to review the determination, then the ALJ's determination is final. If the Administrator reviews the determination, all parties will be given reasonable opportunity to file written statements. Subsequently, if the Administrator decides to deny an application for financial assistance, or annul, suspend, or terminate EPA assistance, that decision becomes effective 30 calendar days after the Administrator submits a written report to Congress.<sup>50</sup>

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<sup>46</sup> 40 CFR 7.115(d).

<sup>47</sup> *Id.*

<sup>48</sup> *See* section VII.A.3. (discussing voluntary compliance), 40 CFR 7.115(e).

<sup>49</sup> 40 CFR 7.115(e), 7.130(b). OCR may postpone or pause proceedings to deny, annul, suspend, or terminate EPA assistance, if the recipient has demonstrated a good faith effort (*e.g.*, signed a voluntary compliance agreement) to come into compliance.

<sup>50</sup> 40 CFR 7.130(b).

Recipients may be able to challenge EPA's finding in court. Moreover, those who believe they have been discriminated against in violation of Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their Title VI administrative remedies with EPA.<sup>51</sup>

## **B. Roles and Opportunities to Participate**

### ***1. Recipients***

OCR may work closely with recipients to ensure that the Agency has a complete and accurate record of all relevant information pertaining to the complaint, and a full understanding of the recipient's position relating to the allegations. In order for OCR to perform the appropriate analyses, one of the most important things recipients may do as early as possible is to provide OCR with all of the information relevant to the complaint, including, but not limited to, background information, the permit application(s), monitoring data, computer modeling, other aspects of the recipient's analysis of the application(s), and any information relating to steps the recipient took to address potential Title VI concerns, as described in Section V. B. of this document. OCR may request interviews of a recipient's staff, and copies of or access to relevant documents in the recipient's possession. Moreover, under EPA's Title VI regulations, OCR has the authority to obtain information from recipients and interview recipient staff.<sup>52</sup> Full and expeditious disclosure of such information would facilitate resolution of Title VI complaints.<sup>53</sup>

EPA's Title VI implementing regulations provide the recipient with several opportunities to respond to the complaint and to OCR's finding. First, the recipient may make a written submission responding to, rebutting, or denying the allegations raised in a complaint within 30 calendar days of receiving notification that OCR has received the complaint for investigation.<sup>54</sup> Second, OCR will attempt to resolve the complaint informally, during which time the recipient will be able to state its position. Third, if OCR makes a preliminary finding of noncompliance with the regulations, the recipient may submit a written response within 50 calendar days of receiving the preliminary finding, demonstrating that the preliminary findings are incorrect or

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<sup>51</sup> See *Powell v. Ridge*, 189 F.3d 387, 397-400 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999) (finding that citizens have a private right of action under agency's regulations promulgated under section 602 of Civil Rights Act of 1964).

<sup>52</sup> 40 CFR 7.85(b), (f).

<sup>53</sup> In addition to considering information supplied by recipients, OCR will also evaluate information provided by complainants and may develop its own information and analyses.

<sup>54</sup> 40 CFR 7.120(d)(1).

that compliance may be achieved through steps other than those recommended by OCR.<sup>55</sup> Finally, if OCR begins the procedure to deny, annul, suspend, or terminate EPA assistance, recipients may request a hearing before an ALJ<sup>56</sup> and, if the ALJ's decision upholds a finding of noncompliance, the recipient may then file exceptions with the Administrator.<sup>57</sup>

## ***2. Complainants***

Once OCR accepts a complaint for investigation, complainants may play an important role in the administrative process; however, that role is determined by the nature and circumstances of the claims. As with the recipient, one of the most important things that complainants may do is to provide OCR with all of the information in their possession relevant to their complaint. OCR may request interviews of complainants, and copies of or access to relevant documents in the complainant's possession.

Also, complainants may play an important role in the informal resolution process. Upon accepting a complaint for investigation, OCR may suggest that the complainant and the recipient attempt to informally resolve their issues with minimal direct involvement by OCR. In such cases, complainants would clearly have a significant role in the process. Alternatively or in addition to that process, OCR may seek to informally resolve the complaint directly with the recipient. In those situations, the complainant's role is determined by the nature and circumstances of the claims.

It is important to note that EPA does not represent the complainants, but rather the interests of the Federal government, in ensuring nondiscrimination by its recipients. The investigation of Title VI complaints does not involve an adversarial process between the complainant and the recipient. Instead, it should be viewed as OCR following up on information that alleges EPA funds are being used inappropriately. Consequently, the complainants do not have the burden of proving that their allegations are true, although their complaint should present a clearly articulated statement of the alleged violation. It is OCR's job to investigate allegations and determine compliance, although OCR may have difficulty conducting its investigation if complainants are unable or unwilling to provide relevant information. In addition, because the Title VI administrative process is not an adversarial one between the complainant and recipient, there are no appeal rights for the complainant built into EPA's Title VI regulatory process.

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<sup>55</sup> 40 CFR 7.115(d).

<sup>56</sup> 40 CFR 7.130(b)(2).

<sup>57</sup> 40 CFR 7.130(b)(3).

### III. ACCEPTING OR REJECTING COMPLAINTS

#### A. Criteria

It is the general policy of OCR to investigate all administrative complaints concerning the conduct of a recipient of EPA financial assistance<sup>58</sup> that satisfy the jurisdictional criteria in EPA's implementing regulations.<sup>59</sup> OCR does not expect to investigate complaints that are so incoherent that they cannot be considered to be grounded in fact and those that fail to provide an avenue for contacting the complainant (*e.g.*, no phone number, no address).

OCR intends to accept and investigate a complaint if it meets the following jurisdictional criteria:

- (1) It is written (*i.e.*, oral complaints will not be accepted for investigation);<sup>60</sup>
- (2) It identifies the entity that allegedly performed the discriminatory act<sup>61</sup> and describes the alleged discriminatory act(s) that violates EPA's Title VI regulations (*i.e.*, an act of intentional discrimination or one that has the effect of discriminating on the basis of race, color, or national origin);<sup>62</sup>
- (3) It is filed within 180 calendar days of the alleged discriminatory act(s);<sup>63</sup> and
- (4) It is filed by:
  - (a) a person who was allegedly discriminated against in violation of EPA's Title VI regulations;
  - (b) a person who is a member of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations; or
  - (c) a party that is authorized to represent a person or specific class of people who were allegedly discriminated against in violation of EPA's Title VI regulations.<sup>64</sup>

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<sup>58</sup> See 40 CFR 7.15.

<sup>59</sup> See 40 CFR 7.120.

<sup>60</sup> 40 CFR 7.120(b)(1).

<sup>61</sup> Because EPA's Title VI regulations apply only to recipients of EPA financial assistance, OCR will, within the 20-day period, establish whether the person or entity that took the alleged discriminatory act is in fact an EPA recipient as defined by 40 CFR 7.25.

<sup>62</sup> 40 CFR 7.120(b)(1).

<sup>63</sup> 40 CFR 7.120(b)(2); *see also* section III.B. (discussing timeliness of complaints).

<sup>64</sup> 40 CFR 7.120(a). Information submitted by parties that does not satisfy these criteria may be used by OCR to determine whether to perform a compliance review under 40 CFR §§ 7.110, 7.115.

EPA's Title VI regulations state that OCR will make a determination to accept for investigation, reject, or refer to the appropriate Federal agency, a complaint within 20 calendar days of acknowledgment of its receipt.<sup>65</sup> Also, if OCR needs clarification before any of the above listed determinations can be made on particular allegations, it will request further clarification.

If a complaint contains multiple allegations, it is possible that OCR may reject some allegations, refer some allegations to other appropriate Federal agencies, and/or request clarification on some allegations. OCR will notify the complainant and the recipient of such actions.<sup>66</sup>

It is expected that some recipients may voluntarily adopt individual activities or more comprehensive approaches designed to identify and address potential Title VI concerns. Section II of the *Draft Recipient Guidance* discusses steps that recipients can take to reduce the likelihood of Title VI complaints, including emphasizing effective public participation and identifying areas for development of agreements to reduce impacts. The identification and remedy of such concerns, independent of a particular permitting decision or early in a permitting process, may lead to generalized improvements in public health and the environment and may reduce the number of Title VI complaints filed with EPA. Recipients can combine individual activities and approaches encouraged in the *Draft Recipient Guidance* to address a range of potential issues that might result in Title VI complaints.<sup>67</sup> However, OCR's threshold decision to accept a complaint for investigation or to reject it is based on the jurisdictional criteria provided in EPA's Title VI regulations,<sup>68</sup> regardless of whether the recipient adopted any individual activities or a more comprehensive approach to address Title VI concerns.

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<sup>65</sup> 40 CFR 7.120(d)(1).

<sup>66</sup> 40 CFR 7.120(d)(1)(ii).

<sup>67</sup> See Sections V.B.2. and VI.B.1.b. (discussing "due weight" for recipient's complaint-specific analyses and other Title VI efforts).

<sup>68</sup> See 40 CFR 7.120; see also Section III.A.



## **B. Timeliness of Complaints**

### ***1. Start of 180-day “Clock”***

Under EPA’s regulations, a complaint must be filed within 180 calendar days of the alleged discriminatory act.<sup>69</sup> Complaints alleging discriminatory effects resulting from a permit should be filed with EPA within 180 calendar days of issuance of that permit. If the 180<sup>th</sup> day falls on a weekend or holiday, that day will not be counted and the deadline for filing will be extended to the next business day. However, weekends and holidays that occur before the 180<sup>th</sup> day should be counted toward the 180 days. OCR generally considers a complaint to be “filed” on the date that it arrives at EPA, not on the date that the complaint is mailed or otherwise transmitted to EPA by the complainant. EPA will likely accept a complaint alleging a continuing violation as long as action subject to Title VI has occurred within the 180-day period.

Allegations concerning a discriminatory public participation process should be filed within 180 calendar days of the alleged discriminatory act in that process. For example, if complainants allege that the recipient improperly excluded them from participating in a hearing, then the complaint should be filed within 180 calendar days of that hearing.

Complaints not filed within the 180 calendar day time period will generally be considered untimely and will not be accepted for investigation. While a specific complaint may be rejected on the basis of untimeliness, OCR may choose to conduct a compliance review of the recipient’s relevant permit program either at that point in time or at some future date.<sup>70</sup>

### ***2. Good Cause Waiver***

OCR may waive the 180-day time limit for good cause.<sup>71</sup> OCR will determine on a case-by-case basis whether to waive the time limit for good cause.

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<sup>69</sup> 40 CFR 7.120(b)(2). It should be emphasized that “180 calendar days” is not the same as “six months.”

<sup>70</sup> *See*, 40 CFR 7.110, 7.115.

<sup>71</sup> 40 CFR 7.120(b)(2).

### ***3. Ongoing Permit Appeals or Litigation***

OCR will generally dismiss complaints without prejudice<sup>72</sup> if the issues raised in the complaint are the subject of either ongoing administrative permit appeals or litigation in Federal or state court. The outcome of such permit appeals or litigation could affect the circumstances surrounding the complaint and any investigation that OCR may conduct. In such cases, OCR believes that it should await the results of the permit appeal or litigation. As a result, such complaints will generally be closed, but OCR expects to waive the time limit to allow complainants to re-file their complaints after the appeal or litigation, rather than conduct a simultaneous investigation on the basis of facts that may change due to the outcome of the administrative appeal or litigation.

#### **a. Permit Appeal Processes**

OCR believes, in making a good cause determination, that it is appropriate to consider a complainant's pursuit of its Title VI concerns through the recipient's administrative appeal process. This will encourage complainants to exhaust administrative remedies available under the recipient's permit appeal process and foster early resolution of Title VI issues. Under such circumstances and after evaluating other considerations relevant to the particular case, OCR may waive the 180 day filing time limit if the complaint is filed within a reasonable time period after the conclusion of the administrative appeal process. Generally, that reasonable time period will be no more than 60 calendar days.

#### **b. Litigation**

If the complainant seeks to pursue a Title VI complaint with OCR on issues that are the subject of ongoing Federal or state court litigation, the complaint should be re-filed within a reasonable time period, generally no more than 60 calendar days after the conclusion of the litigation. However, OCR may choose not to proceed with a complaint investigation if the allegations in the complaint were actually litigated and substantively decided by a Federal court. For example, if a Federal court reviewed evidence presented by both parties and issued a decision that stated the allegations of discrimination were not true, OCR may choose not to investigate allegations in the complaint that deal with those same issues. In addition, if a state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process.

Generally, OCR may choose to investigate if the complaint raises issues that were not actually litigated or substantively decided by a Federal court, or if it raises unique and important legal or policy issues. OCR may look for guidance to judicial principles and other provisions of

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<sup>72</sup> In other words, OCR may dismiss the complaint, but that dismissal would not prohibit the complainant from re-filing its complaint at a later date.

law on how prior court decisions may affect OCR's determination of whether to investigate a complaint.

#### ***4. Premature Complaints***

When complaints alleging discriminatory effects from a permit are filed prior to the issuance of the permit by the recipient, OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice. If the complainant is not satisfied Title VI nondiscrimination requirements have been met when the permit is issued, the complainant can re-file its complaint if and when the permit is issued. In any case, OCR intends to provide the recipient with a copy of the complaint to facilitate the recipient's ability to appropriately address the concerns raised in the complaint during the permitting process.

### **IV. RESOLVING COMPLAINTS**

EPA's Title VI regulations call for OCR to pursue informal resolution of administrative complaints wherever practicable.<sup>73</sup> To conserve EPA investigative resources and to obtain beneficial results for the parties, EPA encourages pursuit of informal resolution from the beginning of the administrative process. The term "informal resolution" refers to any settlement of complaint allegations prior to the issuance of a formal finding of noncompliance. Settlement after a formal finding is referred to as reaching "voluntary compliance." Voluntary compliance agreements must be in writing, set forth the specific steps the recipient has agreed to take, and be signed by the Director of OCR or her designee and an official with legal authority to bind the recipient.<sup>74</sup>

#### **A. Reaching Informal Resolution**

OCR will encourage informal resolution in both the notification of receipt of a complaint and again with acceptance of a complaint for investigation. Informal resolution may follow either of the two approaches below.

##### ***1. Informal Resolution Between Recipient and Complainant***

The first approach is for the recipients and complainants to try to resolve the issues between themselves. To the extent resources are available, EPA expects to provide support for efforts at informal resolution. If the resolution results in withdrawal of the Title VI administrative complaint, OCR would expect to dismiss the complaint, notify the recipients and complainants, and close the complaint file. OCR encourages recipients to consider the use of alternative dispute resolution (ADR) techniques when appropriate to informally resolve the

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<sup>73</sup> 40 CFR 7.120(d)(2).

<sup>74</sup> 40 CFR 7.115(f).

complaint. ADR includes a variety of approaches including the use of a third party neutral acting as a mediator or the use of a structured process through which the parties can participate in shared learning and creative problem solving to reach a consensus.<sup>75</sup>

## ***2. Informal Resolution Between EPA and Recipient***

A second approach is for OCR and the recipient to reach agreement on relief. Depending upon the facts and circumstances of the complaint, OCR may seek participation from the complainant, the permittee, or others. In appropriate situations, OCR expects to use ADR techniques to informally resolve the complaint.

OCR will discuss offers by recipients to reach informal resolution at any point during the administrative process before the formal finding. However, it is OCR's responsibility to ensure that the interests of the Federal government are served and no violations of Title VI or EPA's implementing regulations exist in a recipient's programs or activities. Therefore, before any agreement between the recipient and OCR can be reached, an investigation may be needed to determine the appropriate relief and/or corrective action necessary to eliminate or reduce to the extent required by Title VI the adverse disparate impacts.

### **B. Implementing Informal Resolutions<sup>76</sup>**

As described above, EPA encourages recipients to informally resolve Title VI complaints with complainants and/or OCR. In appropriate circumstances, the Agency expects that measures that eliminate or reduce to the extent required by Title VI the alleged adverse disparate impacts will be an important focus of the informal resolution process. Denial of the permit at issue will not necessarily be an appropriate solution. It will likely be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists. During the informal resolution process, whether with EPA or with complainants, recipients can offer to provide various measures to reduce or eliminate impacts that are narrowly tailored toward contributing sources, including the permit at issue, using the recipient's existing permitting authorities. Such measures include changes in policies or procedures, additional pollution control, pollution prevention, offsets, and emergency planning and response.

Alternatively or in addition, during the informal resolution process, recipients can propose broader measures that are outside those matters ordinarily considered in the permitting process. For example, in response to a complaint alleging that airborne lead emissions from a permitted facility will have an adverse disparate impact on nearby residents, the recipient and

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<sup>75</sup> See *Draft Recipient Guidance*, Section II.B.5. (providing additional information about alternative dispute resolution).

<sup>76</sup> See *Draft Recipient Guidance*, section II.B.6. (providing additional information about remedial measures).

complainant could agree to an informal resolution under which the recipient would obtain lead emissions reductions from that facility, as well as from other facilities contributing lead emission in the area. The recipient could also offer to work with other agencies to establish a household lead abatement program to further reduce the facility's impact.<sup>77</sup> If the issues are informally resolved and the complainant withdraws the complaint, OCR expects to close its investigation.

During the informal resolution process, the recipient may independently submit a plan to OCR to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts. While the plan may be developed without consulting with complainants or others, EPA expects that informal resolution will be more successful if recipients work with OCR, complainants, and other appropriate parties to develop a plan for eliminating or reducing the alleged adverse disparate impact. Cooperative approaches, such as area-specific agreements<sup>78</sup> to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts, will more likely adequately address the Title VI concerns.

If the recipient is pursuing a resolution with OCR, the sufficiency of such an approach would likely be evaluated in consultation with experts in the EPA program at issue. OCR may also consult with complainants, although their consent is not necessary. If, based on its review, OCR agrees that the adverse disparate impact will be eliminated or reduced, to the extent required by Title VI, pursuant to the plan, the parties will be so notified. Assuming that sufficient assurances are provided regarding implementation of such a plan, the complaint would be resolved and closed. The measures should be established in a settlement agreement to be monitored by OCR. Any settlement agreement should provide for enforcement by EPA, which may include special conditions on future assistance grants for failure to comply with the agreement.

It may be possible to reach informal resolution regarding some, but not all, of the allegations OCR accepts for investigation. Those not informally resolved will be investigated and resolved through the process outlined in EPA's Title VI regulations and in accordance with this guidance. OCR may also reopen a complaint if the recipient does not comply with its commitments in the settlement agreement.

## **V. INVESTIGATIVE PROCEDURES**

The process of investigating a Title VI complaint is not analogous to a judicial process in which plaintiffs and defendants must each present information and arguments supporting a

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<sup>77</sup> See *Draft Recipient Guidance*, section II.B.4. (providing additional information about intergovernmental involvement).

<sup>78</sup> See sections V.B.2. and VI.B.1.b. (discussing area-specific agreements); see also, *Draft Recipient Guidance*, section II.A.2. (describing geographic area-specific approaches).

particular finding. EPA, like other Federal agencies, is responsible for investigating formal complaints concerning the administration of programs by recipients of financial assistance. However, EPA expects that this process will often be substantially improved and expedited by information submitted by complainants and recipients.

#### **A. Submission of Additional Information**

During the course of the investigation, complainants and recipients may submit additional relevant information to supplement EPA's analyses. OCR intends to balance the need for a thorough investigation with the need to complete the investigation in a timely manner. Therefore, at the conclusion of interviews of the complainants, recipients, or other witnesses, OCR expects to ask each to submit, within a reasonable time of the interview (*e.g.*, 14 calendar days), any additional information that they would like considered as OCR drafts its investigative report.

EPA encourages recipients to adopt individual activities or more comprehensive approaches designed to identify and address potential Title VI concerns. Section II of the *Draft Recipient Guidance* offers suggestions that recipients can take to reduce the likelihood of Title VI complaints, including emphasizing effective public participation, and identifying areas for development of agreements to reduce impacts. The identification and remedy of such concerns, independent of a particular permitting decision or early in a permitting process, may lead to generalized improvements in public health and the environment, and may reduce the number of Title VI complaints filed with EPA. OCR will carefully review any information provided by a recipient concerning the procedures and outcomes of programs adopted to address Title VI concerns.

#### **B. Granting Due Weight to Submitted Information**

Under the Civil Rights Act of 1964, EPA is charged with assuring compliance with Title VI and cannot delegate its responsibility to enforce Title VI to its recipients.<sup>79</sup> Therefore, OCR cannot grant a recipient's request that EPA defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations or that EPA rely on an assertion that a Title VI program

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<sup>79</sup> 42 U.S.C. 2000d-1.

has been followed.<sup>80</sup> Thus, with regard to the processing of Title VI complaints, EPA is required to retain the:

- ability to supplement the recipient's analysis or to investigate the issues *de novo*;
- approval authority over any proposed resolution; and
- ability to initiate its own enforcement actions and compliance reviews.

### *1. Analyses or Studies*<sup>81</sup>

In response to allegations, or during the course of an investigation, recipients as well as complainants may submit evidence such as data and analyses to support their position that an adverse disparate impact does or does not exist.<sup>82</sup> EPA believes that it can, under certain circumstances, recognize the results of such analyses and give them appropriate due weight.

OCR would expect that a relevant adverse impact analysis or a disparity analysis would, at a minimum, generally conform to accepted scientific approaches. It may focus on a spectrum of potential adverse impacts, such as described in the analytical framework set forth in section VI below, or may be more focused, such as upon the impact of a specific pollutant on nearby populations (*e.g.*, a study regarding the impact of lead emissions on blood lead levels in the surrounding area). The weight given any information related to the level or existence of adverse impacts and the extent to which OCR may rely on it in its decision will likely vary depending upon the following elements:

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<sup>80</sup> See 28 CFR 50.3(b) ("Primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance."); Memorandum from Bill Lann Lee, Acting Assistant Attorney General, U.S. Department of Justice, to Executive Agency Civil Rights Directors, p. 3 (Jan. 28, 1999) (titled *Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs*) ("It is important to remember that Federal agencies are responsible for enforcing the nondiscrimination requirements that apply to recipients of assistance under their programs.").

<sup>81</sup> While recipients are not required to submit complaint-specific analyses or to develop more comprehensive Title VI approaches, such as the area-specific agreements described below, such efforts could help avoid Title VI problems by identifying and addressing potential adverse disparate impacts.

<sup>82</sup> This *Draft Revised Investigation Guidance* is limited to investigating allegations of discriminatory effects resulting from the issuance of permits; therefore, investigatory techniques and the concept of due weight applied in the context of allegations regarding discrimination in public participation processes are not addressed. However, the *Draft Recipient Guidance*, section II.C. contains a discussion of the circumstances under which OCR might accord a public participation process due weight.

- Relevance of the evidence to the alleged impacts;
- Validity of the methodologies;
- Completeness of the documentation submitted;
- Degree of consistency between the methodology used, and the findings and conclusions; and
- Uncertainties of the input data and results.

Consequently, submitted materials would be subject to scientific review by EPA experts.

OCR expects to give more weight to submitted analyses that are relevant to the Title VI concerns in the complaint and have sufficient scope, completeness, and accuracy. If the analyses submitted meet the elements above, OCR will not seek to duplicate or conduct such analyses, but instead will evaluate the appropriateness and validity of the relevant methodology and assess the overall reasonableness of the outcome or conclusions at issue.

If the elements above are met, then OCR will likely rely on the evidence in its decision. In the instance where a submitted analysis shows no adverse disparate impact exists, and the analysis generally follows the procedures in section VI below and meets the elements described above, then OCR may rely on it in a finding that the recipient is in compliance with EPA's Title VI regulations. If OCR's review reveals that the evidence contains significant deficiencies with respect to the elements above, then the analysis will likely not be relied upon in OCR's decision.

## ***2. Area-specific Agreements***

In the *Draft Recipient Guidance*, EPA encourages recipients to identify geographic areas where adverse disparate impacts may exist and to enter into agreements with affected residents and stakeholders to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts in those specific areas.<sup>83</sup> Collaboration with communities and other appropriate stakeholders to develop the criteria used to identify the geographic areas and in designing potential solutions to address any adverse disparate impacts will be an important element of the approach.

An example of an approach to develop an area-specific agreement might be where a recipient, in collaboration with communities and other appropriate stakeholders, identifies a section of a city as an area where permitted lead emissions are contributing to discriminatory health effects on African Americans. The recipient then might convene a group of stakeholders with the ability to help solve the identified lead problem, including owners of facilities with lead emissions, other state and local government agencies, affected community members, and non-governmental organizations. The group may develop an agreement where each party agrees to particular actions that will eliminate or reduce the adverse lead impacts in that specific area.

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<sup>83</sup> See *Draft Recipient Guidance*, section II.A.2. (discussing area-specific agreements).



Another example might be an area-specific agreement that establishes a ceiling on pollutant releases with a steady reduction in those pollutants over time. The period of time over which those reductions should occur will likely vary with a number of factors, including the magnitude of the adverse disparate impact, the number and types of sources involved, the scale of the geographic area, the pathways of exposure, and the number of people in the affected population. It is worth noting, however, that pre-existing obligations to reduce impacts imposed by environmental laws (*e.g.*, “reasonable further progress” as defined in Clean Air Act section 171(1)) might not be sufficient to constitute an agreement meriting due weight. Also, area-specific agreements need not be limited to one environmental media (*e.g.*, air emissions), they may also cover adverse disparate impacts in several environmental media (*e.g.*, air and water).

If OCR accepts a complaint for investigation involving allegations of adverse disparate impacts related to any of the permitting actions covered by an area-specific agreement, OCR expects, under certain circumstances, to review and give due weight to the agreement if it:

- Is supported by underlying analyses that have sufficient depth, breadth, completeness, and accuracy, and are relevant to the Title VI concerns; and
- Will result in actual reductions over a reasonable time to the point of eliminating or reducing, to the extent required by Title VI, conditions that might result in a finding of non-compliance with EPA’s Title VI regulations.<sup>84</sup>

The greatest weight OCR could accord such an agreement is to find that the actions taken under it will eliminate or reduce, to the extent required by Title VI, existing adverse disparate impacts. If OCR makes such a finding, it would then close its investigation into the allegation.

If a later-filed complaint raises allegations regarding other permitting actions by the recipient that are covered by the same area-specific agreement, OCR would generally rely upon its earlier finding and dismiss the allegations. An exception to this general guideline would occur where there is an allegation or information revealing that circumstances had changed substantially such that the area-specific agreement is no longer adequate or that it is not being properly implemented.

If OCR’s review reveals that the area-specific approach, the specific agreement, or its underlying analyses do not result in actual reductions to the point of significantly reducing or eliminating impacts that would result in a finding of non-compliance with EPA’s Title VI regulations, then it will likely not be relied upon in OCR’s decision. In that instance, OCR would be more likely to conduct a first-hand investigation of the allegations. Throughout the investigation, EPA also intends to consider other available information, including information submitted by complainants.

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<sup>84</sup> The determination that an area-specific agreement will result in actual reductions of adverse disparate impacts will likely entail many of the same steps described in sections VI.B.2 through 4.

### **C. Submission of Additional or Amended Complaints**

During the course of OCR's investigations, complainants can also submit additional allegations of violations of EPA's Title VI regulations. Each additional allegation would have to satisfy the jurisdictional criteria described in section III.A. above in order to be accepted for investigation.<sup>85</sup> Generally, the additional allegations will be considered a new and separate complaint. In some cases, for reasons of efficiency, OCR may treat the new allegations as amendments to the existing complaint and incorporate them into the existing investigation.

For example, assume OCR accepts a complaint for investigation that only alleges that a recently issued water discharge permit has a discriminatory human health impact on African Americans. Two months after OCR conducts interviews, complainants attempt to amend their complaint by alleging that two air emissions permits issued for a different part of the source have a discriminatory effect on African Americans. In this instance, OCR will generally consider the allegations regarding the air permits as a new complaint, not an amendment to the existing complaint, because incorporating the new allegations would substantially change the scope of the existing investigation. Complainants and recipients will be appropriately notified.

If a complainant amends its complaint with additional allegations before OCR decides to accept for investigation, reject, or refer the allegations to another Federal agency, OCR intends to acknowledge receipt of the new allegations and notify the recipient. Both the complainant and the recipient should also be notified that OCR expects to make a determination to accept for investigation, reject, request clarification, or refer all of the allegations within 20 calendar days of receipt of the most recent allegations.<sup>86</sup>

### **D. Discontinued Operations/Mootness**

OCR expects to dismiss allegations about discriminatory effects of a permit if, prior to commencement of any activities allowed by the permit and before OCR completes its investigation, that permit is withdrawn or revoked, or if a final decision is made by the permittee not to operate under that permit. If the activities commence under the permit at issue, but are permanently halted for any reason prior to the conclusion of OCR's investigation, OCR may continue its investigation because some discriminatory effects may have occurred as a result of operations. However, the current status of the source should be taken into account in the analysis. OCR expects that other allegations that are not specific to the permit (*e.g.*, allegations concerning state-wide issues) would not be closed because those issues may continue to exist notwithstanding the status of the permit.

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<sup>85</sup> See 40 CFR 7.120.

<sup>86</sup> 40 CFR 7.120(d)(1).

### **E. Filing/Acceptance of Title VI Complaint Does Not Invalidate Permit**

Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue.

## **VI. ADVERSE DISPARATE IMPACT ANALYSIS**

Evaluations of alleged violations of EPA's Title VI regulations should be based upon the facts and totality of the circumstances that each case presents, and show both an adverse and disparate effect. Rather than using a single technique for analyzing and evaluating adverse disparate impact allegations in all situations, OCR expects to use several techniques within the broad framework discussed here. Moreover, OCR expects that parts of the analytical framework described in this section will be omitted, altered, or supplemented to address the particular characteristics of each complaint. Any method of evaluation chosen within that framework will be a reasonably reliable indicator of the level of potential adverse impacts and disparity.

### **A. Framework for Adverse Disparate Impact Analysis**

The framework that OCR expects to use for determining whether an adverse disparate impact exists should generally be performed in a step-wise fashion in the order set forth below.

#### ***Step 1: Assess Applicability***

- Determine the type of permit action at issue (*i.e.*, new permit, renewal, modification). Generally, OCR will not initiate an investigation where the permit that triggered the complaint is a modification, such as a facility name change or a change in a mailing address, that does not involve actions related to the stressors identified in the complaint.
- Determine whether the relevant permit is covered by an area-specific agreement that OCR has already determined will eliminate or reduce, to the extent required by Title VI, the adverse disparate impacts. If so, then the investigation of the allegation will likely be closed.<sup>87</sup>
- If the complaint alleges discriminatory effects from emissions, including cumulative emissions, determine whether the permit action that triggered the complaint significantly decreases overall emissions at the facility. If so, then OCR will likely close the investigation of allegations regarding cumulative impacts.
- If the complaint alleges discriminatory effects from emissions, including cumulative emissions, and it specifies certain pollutants of concern, determine

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<sup>87</sup> See section V.B.2. (discussing criteria for area-specific agreements that would receive due weight).

whether the permit action that triggered the complaint significantly decreases those pollutants of concern named in the complaint or those pollutants EPA reasonably infers are the potential source of the alleged impact. If so, then OCR will likely close the investigation of allegations regarding cumulative impacts.

***Step 2: Define Scope of Investigation:*** Determine the nature of stressors, sources of stressors, and/or impacts cognizable under the recipient's authority; review available data; determine which sources of stressors should be included in the analysis; and develop a project plan.

***Step 3: Conduct Impact Assessment:*** Determine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, are likely to result in an impact.

***Step 4: Make Adverse Impact Decision:*** Determine whether the estimated risk or measure of impact is adverse. If the impact is not adverse, the allegation will not form the basis of a finding of non-compliance with EPA's Title VI regulations and will be closed. If the permit action clearly leads to a decrease in adverse disparate impacts, it is not expected to form the basis of a finding of a recipient's non-compliance with EPA's Title VI regulations and will be closed.

***Step 5: Characterize Populations and Conduct Comparisons:*** Determine the characteristics of the affected population. Conduct an analysis to determine whether a disparity exists between the affected population and an appropriate comparison population in terms of race, color, or national origin, and adverse impact.

***Step 6: Make Adverse Disparate Impact Decision:*** Determine whether the disparity is significant. If it is not significant, the allegation will not likely form the basis of a finding of non-compliance with EPA's Title VI regulations and will likely be closed.

Each of these steps is described more fully below.

## **B. Description of Adverse Disparate Impact Analysis**

### ***1. Assess Applicability***

Assessing the applicability involves three initial considerations as outlined below.

#### **a. Determine Type of Permit**

Allegations that concern impacts resulting from a recipient's permitting actions can arise in several different contexts: (1) the issuance of new permits; (2) the renewal of existing permits; and (3) the modification of existing permits. Regardless of the type of permit involved, if a

complaint is filed with OCR alleging that the recipient violated Title VI or EPA's regulations, OCR's decision to accept the complaint for investigation or to reject it must be based on the jurisdictional criteria provided in EPA's Title VI regulations.<sup>88</sup>

Modifications, such as a facility name change or a change in a mailing address, that do not involve actions related to the stressors identified in the complaint, generally will not form the basis for a finding of noncompliance and will likely be closed.

The following type of permit actions could form the basis for initiating a Title VI investigation of the recipient's permitting program:

- Permit actions, including new permits, renewals, and modifications, if the permit causes a net increase in the level of stressors or predicted risks or measures of impact (*e.g.*, an increase in pollutants with no offsetting reductions).
- Permit actions, including new permits, renewals, and modifications, that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged.

If an allegation regarding a permit modification is accepted for investigation, EPA expects the analysis would only evaluate the modification and its effects.

There are two situations where OCR will likely close its investigation into allegations of discriminatory effects:<sup>89</sup>

(1) If the complaint alleges discriminatory effects from emissions, including cumulative emissions, and the permit action that triggered the complaint significantly decreases overall emissions<sup>90</sup> at the facility; and

(2) If the complaint alleges discriminatory effects from emissions, including cumulative emissions, and the permit action that triggered the complaint significantly decreases all pollutants of concern named in the complaint or all the pollutants EPA reasonably infers are the potential source of the alleged impact.<sup>91</sup>

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<sup>88</sup> 40 CFR 7.120. *See also* section III.A.

<sup>89</sup> This guidance does not alter in any way, a regulated entity's obligation to comply with applicable environmental laws. Merely proposing a decrease in emissions does not entitle the permit applicant to a permit.

<sup>90</sup> Assessing a significant overall decrease would entail taking into account factors such as total quantity and relative toxicity of the emissions reductions.

<sup>91</sup> It is important to remember that OCR will treat a decrease in *emissions* at a particular facility differently from an area-specific agreement that eliminates *adverse disparate impacts* as

In both situations, the recipients should demonstrate<sup>92</sup> (not merely assert) that the decrease is actual and is significant.<sup>93</sup> The decreases should be in the same media, as well as from the same facility, as alleged in the complaint (*i.e.*, a decrease in discharges to water may not form the basis for closing investigations into allegations of cumulative air impacts). The decreases are measured based on actual, contemporaneous<sup>94</sup> emissions from the facility being permitted. In situations where OCR determines that significant uncertainty exists regarding the significance of the overall decrease or whether the decrease will actually occur, OCR will normally resolve such uncertainty in favor of proceeding to investigate for potential discriminatory effects. If the permit action includes an increase in any emissions, then it would generally result in a decision to investigate the cumulative impact allegation.

OCR will determine the relevant pollutant(s) or stressors of concern based on the allegations in the complaint. However, if a complaint does not explicitly name or refer to particular pollutants or stressors of concern and refers generally to “cumulative impacts” or “overburdened” communities, EPA will use its expertise to determine which pollutants or stressors are of concern based on the complaint and the permitting action at issue.

While a specific complaint may be dismissed on the basis of a decrease, OCR may choose to conduct a compliance review of the recipient’s relevant permit program either at that point in time or at some future date.<sup>95</sup> The analysis of whether discriminatory effects result from cumulative emissions, and any resulting remedy, would include consideration of the emissions from the permit actions that triggered the original complaint (*i.e.*, the one that had the decrease).

The above discussion regarding decreases does not affect allegations relating to public participation.

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discussed in section V.B.2. While the decrease in emissions from a single permit may result in dismissal of the instant complaint, other complaints regarding permit renewals and increases in emissions for other sources in the area may be investigated. However, if OCR determines that an area-specific agreement meets the criteria described in section V.B.2, then investigations into future complaints regarding permit actions covered by the area-specific agreement generally will be closed.

<sup>92</sup> A recipient may use actual monitoring data, reasonable estimates, permit limits, parametric monitoring, or any other reliable means to demonstrate the decrease to the satisfaction of EPA.

<sup>93</sup> EPA will determine significance of a decrease in the context of a specific case.

<sup>94</sup> Contemporaneous emissions decreases are required. Banking over time is not a basis for a decrease dismissal.

<sup>95</sup> See 40 CFR 7.110, 7.115.

## **b. Determine if Permit is Part of an Agreement to Reduce Adverse Disparate Impacts**

Recipients may have identified geographic areas where adverse disparate impacts may exist, and may have entered into agreements with the affected communities and stakeholders to reduce impacts in those specific areas.<sup>96</sup> If the relevant permit is covered by an area-specific agreement that OCR has already determined will eliminate adverse disparate impacts, then the allegation will likely be closed.

**2. Define Scope of Investigation:** Determine the nature of stressors, sources of stressors, and/or impacts cognizable under the recipient's authority; review available data; determine which sources of stressors should be included in the analysis; and develop a project plan.

In defining the scope of an investigation, OCR expects to rely on four sets of information: the complaint's allegations, an understanding of the recipient's authorities, the results of an evaluation of relevant scientific information, and relevant available data. In particular, assessing background sources of stressors (*e.g.*, mobile source air emissions, non-point source runoff) allegedly contributing to discriminatory effects, as discussed below, may be required to understand whether an adverse impact is created or exacerbated. However, in determining whether a recipient is in violation of Title VI or EPA's implementing regulations, the Agency expects to account for the adverse disparate impacts resulting from sources of stressors, stressors, and/or impacts cognizable under the recipient's authority.<sup>97</sup>

## **a. Determine the Nature of Stressors and Impacts Considered**

In determining the nature of stressors (*e.g.*, chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by applicable laws and regulations. These could include laws and regulations that concern permitting programs and laws and regulations that involve broader, cross-cutting matters, such as state environmental policy acts. For example, a state statute might require all major state actions (including the issuance of certain air pollution control permits) to take into consideration impacts resulting from noise and odors associated with the action. Even if these were not explicitly covered by the permitting program, they would appropriately be considered as part of the adverse disparate impact analysis, since the recipient has some obligation or authority regarding them. A recipient need not have exercised this authority for the stressor or impact to be deemed within the recipient's authority to consider.

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<sup>96</sup> See section V.B.2. (discussing criteria for area-specific agreements that would receive due weight).

<sup>97</sup> See section VII (discussing findings of noncompliance).

OCR will also review the allegations presented in the complaint concerning geographic scope, sources of concern, pollutants or other stressors, and potentially affected populations. OCR expects to supplement this review using available data on identified stressors, as well as others that may be associated with the identified permitted activities, (*e.g.*, TRI and other pollutant inventories that include chemicals not listed in most permits) and other sources of stressors. This review will include information about the characteristics of the sources and stressors (*e.g.*, toxicity, physical-chemical properties) as well as available reports describing possible exposures or risks of release of stressors from permitted activities and sources.

#### **b. Determine Universe of Sources**

In performing assessments of potential adverse disparate impacts, OCR may consider other relevant and/or nearby sources of similar stressors for inclusion in the analysis. Those included in the analysis are referred to as the universe of sources. When a complaint contains more than one allegation, there may be more than one appropriate universe of sources for an investigation. OCR intends to determine the appropriate universe(s) of sources based upon the allegations and facts of a particular case.

As noted above, the relevant universe of sources contributing to the potential adverse impacts could include, if appropriate, background sources (*e.g.*, mobile source air emissions, non-point source runoff). For example, in the case of lead, preexisting or estimated children's blood lead levels that may result from both a permitted source and household lead paint exposures would be used to help decide whether additional emissions of lead are adverse. Thus, cumulative impacts of regulated and unregulated sources can be considered to determine the cumulative level of potential adverse impacts. OCR would generally expect to assess potential adverse cumulative impacts to the extent appropriate data are available, taking into account the uncertainties associated with the data.

In many cases, the nature of the sources of stressors, the stressors, or the impact being alleged is clear from the complaint. For example, complainants may allege that air emissions from specific chemical plants have resulted in higher cancer rates for Hispanics living near those facilities. In some cases, the nature of the sources of stressors or other important information, is not clear. For example, complainants may allege that Asian Americans are "overburdened by pollution" or suffer a variety of impacts from multiple, unidentified types of sources.

In cases where it is unclear, OCR will attempt to determine the source of the stressors and/or the nature of the impact(s) being alleged, based on the type of permitted entity at issue and the kinds of impacts EPA expects could result from the situation described in the complaint. This determination would be made after consulting such resources as scientific literature reviews, engineering studies, and technical experts.

In addition to considering the scope of the allegations and the circumstances of each complaint, OCR expects that the universe of sources will fall into three main categories. One



category includes allegations that involve a permitted facility that is one of a number of similar sources in a geographic area. These facilities, together or in conjunction with background sources, may present a cumulative adverse disparate impact or may reflect a pattern of adverse disparate impact. In these cases, OCR expects an assessment will need to evaluate the cumulative impacts of pollution from a broad universe of regulated and permitted sources<sup>98</sup> (e.g., large manufacturing facilities), as well as regulated but usually unpermitted sources (e.g., some paint stripping or metal finishing operations, mobile sources, sources of surface water runoff), and unregulated sources.

Another universe of sources may include only those that are regulated or permitted. For example, a complaint may allege that the permitting of sanitary landfills throughout the state resulted in discriminatory human health effects for African Americans. If the complaint does not contain an allegation of cumulative impacts from multiple sources, then without any evidence to suggest that permitted sanitary landfills is an inappropriate universe of sources, OCR would investigate the impacts from those regulated sources (e.g., sanitary landfills) described in the complaint.

In some instances, a third universe of sources category, a single permitted entity alone, may support an adverse disparate impact claim. While such a case has not yet been presented to EPA, it might, for example, involve a permitted activity that is unique (*i.e.*, “one of a kind”) under a recipient’s program, such as a permit to store or dispose of a unique type of stressor (e.g., radioactive materials, pathogens). In these cases, only pollutants or other stressors from the specific individual entity that was the focus of the complaint would be considered in the adverse disparate impact analysis. Background sources would generally not be considered in the analysis.

Where the activities covered by a recipient’s authority constitute a portion of the impact, OCR would expect to attempt to conduct an assessment to identify the relative contribution of various source categories. Some cases may require updating the scope of the assessment as a result of an initial review of available materials or investigation. For example, available data estimates or initial assessments of the status of environmental conditions in a study area may change.

Having identified the relevant sources and stressors, OCR would then expect to define the overall scope of the adverse disparate impact investigation, and develop time and resource estimates. The investigation may focus on one or more exposure pathways that stressors could travel from the permitted entity and other sources to potential receptors. This process will also involve forming a project team; assessing data availability, relevance, and reliability; and

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<sup>98</sup> In this context, “regulated or permitted” sources include those with permits, as well as those subject to Federal or state requirements for reporting of waste generation or emissions (e.g., Toxics Release Inventory reporters, Resource Conservation and Recovery Act hazardous waste generator sites).

reviewing the availability of assessment tools, such as appropriate mathematical models and exposure scenarios. The team would develop an initial project scope plan, identify information products, and create a schedule with milestones for the analysis.

**3. Impact Assessment:** Determine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, may result in an adverse impact.

In this step, the investigatory team develops an assessment to determine whether the alleged discriminatory act may cause or is associated with one or more impacts. This involves confirming that an entity is a source of stressor(s) that could cause or be associated with an exacerbation of the alleged impacts, and that there is a plausible mechanism and exposure route (e.g., release of a stressor with known chronic toxicity effects that may be transported via air to receptors for inhalation). EPA expects to attempt to quantify potential impacts, using data on sources, stressors, and associated potential impacts. While EPA will rely on the best available relevant data in its investigations, the utility of available data to make a finding will likely vary with the environmental medium, geographic area, and the recipient's program, among other things. OCR expects to use all readily available relevant data in conducting its assessments.

However, data may not be readily available for many types of impacts, or where available, may not be relevant to the appropriate geographic area. In some situations, the data may be insufficient to perform an analysis. OCR expects to use available data in a hierarchical fashion, depending on their completeness and reliability, placing greatest weight on the most reliable. The following is an example of this hierarchy of data types, in approximate descending order of preference, that OCR expects to use for assessments:

- ambient monitoring data;
- modeled exposure concentrations or surrogates in various environmental media;
- known releases of pollutants or stressors into the environment;
- the manufacture, use, or storage of quantities of pollutants, and their potential for release; and
- the existence of sources or activities associated with potential exposures to stressors (e.g., facilities that are generally likely to use significant quantities of toxic chemicals which could be routinely or catastrophically released; types of agricultural production usually associated with chemical application).

Depending on the allegations in a particular case, and the availability of data, any of these above sources of information may be considered relevant.

The reliability, degree of scientific acceptance, and uncertainties of impact assessment methods varies greatly. In each case, the investigation report is expected to include a discussion of uncertainties in the impact assessment. OCR expects to weigh these uncertainties in the data and methods as part of its decision process (in Step 5). As part of its identification and

development of methods for conducting impact assessments, OCR submitted several example assessment tools for review by the EPA Science Advisory Board.<sup>99</sup> OCR expects to select from the following set of approaches. The facts and circumstances of each complaint will determine whether a likely causal link exists.

**Direct link to impacts.** The strongest evidence demonstrating a causal link between the alleged discriminatory act and the alleged adverse impact would directly link an adverse health or environmental outcome with the source of a stressor. Although such evidence is preferred in reaching a decision, it is rarely available. Not only must one have a set of geographically-specific health or environmental outcome data (*e.g.*, age-adjusted cancer rates), but also evidence that the health or environmental outcomes stem from environmental stressors from the permitted entity. Many types of adverse health impacts may require years of exposure to a large number of people in order to be observed in health outcome data.

**Risk.** Another approach involves prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities or other sources. These predictions may be based on ambient levels of stressors derived from monitoring or modeling, with information about the likelihood of toxic effects occurring. In estimating cancer risks, such unit risk factors estimate the probability of contracting a cancer case for a unit of exposure.<sup>100</sup> For example, an area's predicted cancer risk could be based on the estimated ambient concentration times the unit risk factor. These could be assessed for single chemicals, or be summed for multiple chemicals, based on releases from a single source or a combination of sources and background levels.<sup>101</sup>

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<sup>99</sup> The findings were presented in the December 1998 report, *An SAB Report: Review of Disproportionate Impact Methodologies; A Review by the Integrated Human Exposure Committee (IHEC) of the Science Advisory Board (SAB)*. The report and related materials are available on the OCR Web site at <http://www.epa.gov/civilrights/investig.htm>.

<sup>100</sup> A unit of exposure could include an exposure scenario of a person breathing, on average over a lifetime, a concentration of 1 microgram of pollutant per cubic meter of air.

<sup>101</sup> For non-carcinogens, it is not possible to estimate a probability of occurrence (*i.e.*, risk); however, a ratio of the estimated exposures to benchmark levels can be calculated (*i.e.*, a hazard quotient). Hazard quotients for individual chemicals may be combined to create a cumulative hazard index, which may be used to evaluate the cumulative impact potential. If an exposure occurs at a level below the benchmark level (which would result in a hazard index value less than 1), this usually indicates that no adverse effects would occur. A reference dose is a frequently used example of such a benchmark. However, if an exposure occurs above a benchmark level, it may not be possible to conclude from those data alone that an effect would necessarily occur.

***Toxicity-weighted emissions.*** This approach sums the releases of multiple stressors (usually chemicals) that may be associated with significant risks, weighted by a relative measure of each's toxicity or potential to cause impacts. This approach does not present an explicit prediction of ambient concentrations or levels of the stressors. For example, OCR could obtain or estimate the release quantity of each chemical stressor from a source, multiply it by a chronic toxicity potency factor score, then sum the products across chemicals to yield a total toxicity-weighted stressor score per source. Sources with higher levels of toxicity-weighted stressors would be expected to be associated with a higher likelihood of causing potential adverse impacts.

***Concentration levels.*** This approach would include modeled or monitored ambient concentrations of stressors that may indicate potential levels of concern. For example, if the result of an analysis is a series of chemical concentration estimates, these would be compared to benchmarks of concern for each chemical separately. These benchmarks may be based on several things, including toxicity potency factors similar to those outlined in the Risk discussion above, or rely on less quantitative data.

***4. Adverse Impact Decision:*** Determine whether an estimated risk or measure of impact is significantly adverse. If the impact is not significantly adverse, the allegation is not expected to form the basis of a finding of non-compliance with EPA's Title VI regulations and will likely be closed.

OCR intends to use all relevant information to determine whether the predicted impact is significantly adverse under Title VI. Generally, OCR would first evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy. Where the risks or other measure of potential impact meet or exceed a significance level, they generally would be recognized as adverse under Title VI.

OCR will work with other appropriate EPA offices to evaluate the results. If exposures exceed established environmental or human health benchmarks, the appropriate EPA program office or the Office of Enforcement and Compliance Assurance will be notified so they may take appropriate action under environmental laws and regulations. OCR will coordinate its investigation into potential Title VI violations with any actions taken by other EPA offices. Where no adverse impacts are present for any of the sources or combination of sources described above, the allegation will not form the basis of a finding of non-compliance with EPA's Title VI regulations and will be closed.

This evaluation would need to take into account considerations such as policies developed for single stressors or sources without explicit consideration of cumulative contributions and uncertainties in estimates. In some cases, the relevant environmental laws may not identify regulatory levels for the risks of the alleged human health impact or may not address them for Title VI purposes. For example, the alleged impact may result from cumulative or other

risk of effects from multiple environmental exposure media. In such cases, OCR could consider whether any scientific or technical information indicates that those impacts should be recognized as adverse under Title VI. In making that determination, OCR would work closely with other EPA offices with relevant regulatory programs. Again, where no such risks or impacts are present for any of the sources or combination of sources described above, the allegation will not form the basis for a finding of non-compliance with EPA's Title VI regulations and will be closed.

#### **a. Example of Adverse Impact Benchmarks**

EPA uses a range of risk values for implementing various environmental programs, depending upon the legal, technical, and policy context of the decision at issue. Based on these values, OCR would expect that cumulative risks of less than 1 in 1 million ( $10^{-6}$ ) of developing cancer would be very unlikely to support a finding of adverse impact under Title VI. OCR may make a finding in instances where cumulative risk levels fall in the range of 1 in 1 million ( $10^{-6}$ ) to 1 in 10,000 ( $10^{-4}$ ). OCR would be more likely to issue an adversity finding for Title VI purposes where the cumulative cancer risk in the affected area was above 1 in 10,000 ( $10^{-4}$ ). A finding of adverse impact at this stage of the investigation does not represent a finding of noncompliance under Title VI, but rather represents a criterion for proceeding further in the analysis.

For cumulative non-cancer health effects, which are often measured as a hazard index, the range of values previously used is less well documented, and has been less often applied in a cumulative exposure context. Based on the available precedents, OCR generally would be very unlikely to use values of less than 1 to support a finding of adverse impact under Title VI. Values above 1 cannot be represented as a probability of developing disease or other effect.<sup>102</sup> Generally, the farther the hazard index is above 1, the more likely OCR will be to issue an adversity finding under Title VI.

Compliance with environmental laws does not constitute *per se* compliance with Title VI. Frequently, discrimination results from policies and practices that are neutral on their face, but have the *effect* of discriminating. EPA recognizes that most permits *control* pollution rather than prevent it altogether. Also, there may be instances in which environmental laws do not regulate certain concentrations of sources, or take into account impacts on some subpopulations which may be disproportionately present in an affected population. For example, there may be evidence of adverse impacts on some subpopulations (*e.g.*, asthmatics) and that subpopulation may be disproportionately composed of persons of a particular race, color, or national origin. Title VI is concerned with how the effects of the programs and activities of a recipient are distributed based on race, color, or national origin. A recipient's Title VI obligation exists in addition to the Federal or state environmental laws governing its environmental permitting program.

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<sup>102</sup> For further discussion of this issue, *see* the preceding footnote.

## **b. Use of National Ambient Air Quality Standards**

EPA and the states have promulgated a wide series of regulations to implement public health protections. Some of these regulations are based on assessment of public health risks associated with certain levels of pollution in the ambient environment. The National Ambient Air Quality Standards (NAAQS) established under the Clean Air Act are an example of this kind of health-based ambient standard setting. By establishing an ambient, public health threshold, the primary NAAQS contemplate multiple source contributions and establish a protective limit on cumulative pollution levels that should ordinarily prevent an adverse air quality impact on public health. Air quality that adheres to such standards (*e.g.*, air quality in an attainment area) is presumptively protective of public health in the general population.

If an investigation includes an allegation raising air quality concerns regarding a pollutant regulated pursuant to a primary NAAQS, and where the area in question is attaining that standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as “adverse” within the meaning of Title VI. However, if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome.

For example, one situation where the presumption could be overcome is the following: An area may be in attainment with the lead NAAQS, but in some cases residents could still suffer adverse effects from lead. The lead standard was designed to take into account both exposures from inhalation of airborne lead (subject to the standard) and exposures resulting from non-air pathways such as ingestion of lead contained in paint, soil, or water (not subject to the standard).<sup>103</sup> Contributions to total exposure from non-air sources, however, can vary widely, and unusually high levels of lead in paint, soil, or water might cause residents of some areas to experience adverse effects even if the standard is met. In such cases, the presumption of no adverse impacts from lead could be overcome.<sup>104</sup>

## **c. Assessing Decreases in Adverse Impacts in a Permit Action**

In some circumstances, such as where a decrease in certain emissions is accompanied by an increase in other emissions and OCR determines that the permit action identified in the complaint clearly leads to a significant decrease in *adverse disparate impacts*, OCR’s voluntary

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<sup>103</sup> See 43 FR 46248, 46252-54 (Oct. 5, 1978); *Lead Industr. Ass’n v. EPA*, 647 F.2d 1130, 1141-45 (D.C. Cir. 1980).

<sup>104</sup> Note also that even if an area is in compliance with the NAAQS for a criteria pollutant, there still may be Title VI concerns related to other criteria pollutants, to toxic hot spots associated with hazardous air pollutants under section 112 of the Clean Air Act, or to pollutants from other media.

compliance measures will take that decrease into account, because it is unlikely the permit is solely responsible for the adverse disparate impacts.<sup>105</sup> In general, OCR expects any alleged decrease in impact to be clearly evident and will likely involve the same types of pollutants and pathways that are alleged in the complaint. Generally, when determining whether the alleged discriminatory act increases, decreases, or does not affect the level of adverse impacts, OCR expects to evaluate the allowable release levels in the permit.

**5. Characterize Populations and Conduct Comparisons:** Identify and determine the characteristics of the affected population, and conduct an analysis to determine whether a disparity exists between the affected population and an appropriate comparison population in terms of race, color, or national origin, and adverse impact. If there is no disparity, the allegation will not form the basis of a finding of non-compliance with EPA's Title VI regulations and will be closed.

#### **a. Identify and Characterize Affected Population**

The first element of this step is to identify the affected population. The affected population is that which suffers the adverse impacts of the stressors from assessed sources. Depending on the allegations and facts in the case, various affected populations may be identified.<sup>106</sup> The affected population may be categorized, for example, by likely risk or measure of impact above a threshold of adversity, or by the sources or pathways of the adverse impacts.

The impacts from permitted entities and other sources are not always distributed in a predictable and uniform manner. Therefore, the predicted degree of potential impacts could be associated with a possible receptor population in several ways. Based on Step 3's assessment, which predicted the magnitude (and in some cases, the geographic distribution) of stressor levels associated with adverse impacts, OCR expects to use mathematical models, when possible, to estimate the location and size of the affected populations. An area of adverse impacts may be irregularly shaped due to environmental factors or other conditions such as wind direction, stream direction, or topography. Likewise, depending upon the location of a plume or pathway of impact, the affected population may or may not include those people with residences in closest proximity to a source.

However, simpler approaches based primarily on proximity may also be used where more detailed (*e.g.*, modeled) estimates cannot be developed. The proximity analysis would reflect the environmental medium and impact of concern in the case. For example, for air releases, an inverse relationship with distance from a source could be used within a circle (*i.e.*, the further away from a source, the less the potential degree of impact to a population). For surface water

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<sup>105</sup> See section VII.A.3. (discussion of voluntary compliance).

<sup>106</sup> This could occur when a complaint contains more than one allegation, and/or different populations may be disproportionately affected by different pollutants or exposure pathways.

releases, the impact allocation might involve identifying downstream receptor populations. All of these approaches may incorporate the contribution of other sources of chemical stressors to assess potential cumulative impacts.

The analysis would also attempt to determine the race, color, or national origin of the affected population(s). OCR intends to use available data and demographic analysis methods, such as the currently available U.S. Census information<sup>107</sup> in geographic information systems (GIS) to describe the affected population. In conducting a typical analysis to determine an affected population, OCR would likely generate data estimating the race, color or national origin and density of populations within a certain proximity from a facility or within the geographic distribution pattern predicted by scientific models. OCR would expect to use the smallest geographic resolution feasible for the demographic data, such as census blocks, when conducting disparity assessments. OCR would expect to characterize the affected population for the permitted entity at issue, as well as those in other areas of estimated cumulative adverse impacts.

#### **b. Comparison to Assess Disparity**

The second element of this step involves a disparity analysis that compares the affected population to an appropriate comparison population to determine whether disparity exists that may violate EPA's Title VI regulations. OCR would consider the allegations and factors of each case, and would generally expect to draw relevant comparison populations from those who live within a reference area such as the recipient's jurisdiction (*e.g.*, an air district, a state, an area of responsibility for a branch office), within a political jurisdiction (*e.g.*, town, county, state), or an area defined by environmental criteria, such as an airshed or watershed. For example, where a complaint alleges that Asian Americans throughout a state bear adverse disparate impacts from permitted sources of water pollution, an appropriate reference area would likely be the state. Comparison populations would usually be larger than the affected population, and may include the general population for the reference area (*e.g.*, a county or state population which includes the affected population) or the non-affected population for the reference area (*e.g.*, those in the reference area who are not part of the affected population).

A disparity may be assessed using comparisons both of the different prevalence of race, color, or national origin of the two populations, and of the level of risk of adverse impacts experienced by each population. Since there is no one formula or analysis to be applied, OCR intends to use appropriate comparisons to assess disparate impact depending on the facts and circumstances of the complaint.

As part of OCR's assessment, it is expected that at least one and usually more of the following comparisons of demographic characteristics will be conducted:

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<sup>107</sup> The most current geographically detailed Census information is from the 1990 U.S. Census. Information from the 2000 U.S. Census will not be available until 2001.



- the demographic characteristics of an affected population to demographic characteristics of a non-affected population or general population;<sup>108</sup>
- the demographic characteristics of most likely affected (*e.g.*, highest 5% of risk or measure of adverse impact) to least likely affected (*e.g.*, lowest 5%)<sup>109</sup>
- the probability of different demographic groups (*e.g.*, African Americans, Hispanics, Whites) in a surrounding jurisdiction being in an affected population or a highly affected portion of it;<sup>110</sup>

OCR also expects to compare the level of risk or measure of potential adverse impacts:

- the *average* risk or measure of adverse impact by demographic group within the general population or within an affected population;<sup>111</sup> or
- the *range* of risk or measure of adverse impact by demographic group within the general population or within an affected population.

**6. Adverse Disparate Impact Decision:** Determine whether the disparity is significant. If it is not, the complaint will likely be closed.

The final step of the analysis is to determine whether the disparities demonstrated by comparisons in Step 5 are significant under Title VI. OCR generally expects to review both the disparity in demographic characteristics and in levels of risk or other measure of potential impacts, in the context of the allegations identified in the complaint and investigation scope.

In determining whether a disparity is significant, OCR generally expects to review several possible measures (described in the previous step), and take into account to what degree they are consistent. Moreover, the significance of a given level of disparity may vary depending upon the

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<sup>108</sup> See, *e.g.*, Draft Revised Demographic Information, Title VI Administrative Complaint re: Louisiana Department of Environmental Quality/Permit for Proposed Shintech Facility, April, 1998 (Shintech Demographic Information, April 1998), Facility Distribution Charts D1 through D40 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>, files t-d01-10.pdf, t-d11-20.pdf, t-d21-30.pdf, t-d31-40.pdf.

<sup>109</sup> These values approximate the outlying portions (sometimes called the “tails”) of a distribution of risk that are beyond two standard deviations of the mean value.

<sup>110</sup> See, *e.g.*, Shintech Demographic Information, April 1998, the last column in Tables A1 through B7 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>, table-a1.pdf through table-b.7.pdf.

<sup>111</sup> See, *e.g.*, Shintech Demographic Information, April 1998, last column in Tables C1 through C5 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>, table-c1.pdf through table-c5.pdf.

facts and circumstances of the complaint and comparison population at issue. Nevertheless, OCR intends to apply a few basic rules in assessing the significance of disparity.

For instance, measures of the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations. The purpose of this initial review is to minimize the chance of a false measurement of difference where none actually exists (*e.g.*, because of an inherent variability of the data). OCR expects to work with statisticians to evaluate initial disparity calculations done by investigators.

Initial assessments of disparity would thus be informed by expert opinion, and take into account other considerations such as uncertainties. For example, some time may have passed since the most recent Census, and residential population shifts may have occurred, resulting in uncertainties in demographic characterization. Uncertainties in adverse impact assessments might include the accuracy of predicted risk levels, and the applicability of these levels to potentially exposed populations (*e.g.*, subsistence fish consumption patterns).

OCR would also expect to evaluate the demographic disparity measures and their results in the context of several related factors such as:

- affected population size;
- overall demographic composition of the general comparison population (especially those with very low or very high proportions of particular subgroups); and
- the overall proportion of a jurisdiction's total population within an affected population.

In evaluating disparity in adverse impacts, OCR would expect to also consider such factors as:

- the level of adverse impact (*e.g.*, a little or a lot above a threshold of significance);
- the severity of the impact; and
- its frequency of occurrence.

OCR expects to weigh carefully the potential uncertainties along with these factors in making the determination of whether an adverse disparate impact exists, and whether a finding of noncompliance with EPA's regulations is warranted. EPA generally would expect the risk or measure of potential adverse impact for affected and comparison populations to be similar under properly implemented programs, unless justification can be provided.

A finding of an adverse disparate impact is most likely to occur where significant disparity is clearly evident in multiple measures of both risk or measure of adverse impact, and demographic characteristics, although in some instances results may not be clear. For example, where credible measures of both the demographic disparity and the disparity in rates of impact

are at least a factor of 2 times higher in the affected population, OCR would generally expect to find disparate impact under Title VI. Similarly, in instances where the disparity of both demographic characteristics and impacts are relatively slight, a finding of disparate impact is somewhat less likely (*e.g.*, in cases where both the disparity of impact and demographics are not statistically significant). Finally, where a large disparity exists in terms of impact and a relatively slight disparity exists with regard to demographics (or vice versa), EPA will ordinarily attempt to balance these factors, taking into account the particular circumstances of the case. For instance where a large disparity (*e.g.*, a factor of 10 times higher) exists with regard to a significant adverse impact, OCR might find disparate impact even though the demographic disparity is relatively slight (*e.g.*, under 20%).

However, for both demographic disparity and disparity of impact, there is no fixed formula or analysis to be applied. The significance of a level of disparity may vary depending upon the facts and circumstances of the complaint, the analysis, and the comparison population. Given the wide variability in many of the underlying factors such as the proportion of racial subgroups in the general population,<sup>112</sup> it is impossible to determine a single factor that could be applicable in all cases.

## **VII. DETERMINING WHETHER A FINDING OF NONCOMPLIANCE IS WARRANTED**

In order to find a recipient in violation of the discriminatory effects standard in EPA's Title VI implementing regulations, OCR would determine whether the recipient's programs or activities have resulted in an unjustified adverse disparate impact.<sup>113</sup> In other words, OCR would assess whether the impact is both adverse and borne disproportionately by a group of persons based on race, color, or national origin,<sup>114</sup> and, if so, whether that impact is justified.<sup>115</sup> While assessing background sources of stressors contributing to alleged discriminatory effects may be

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<sup>112</sup> For example, state populations may be used as a basis for comparison with the affected population. Recent data show that the proportion of total “minority” populations (defined as other than white races together with white Hispanics) range from about 4% to 50% of various state populations. In light of that variance, the adoption of a single level of disparity, such as a factor of 2, as the only indicator of significance, would lead to highly inconsistent results. If a complaint alleged discrimination against minorities, as defined above, in some states, a significant disparity would be presumed to exist if less than 10% of an affected population were minority, whereas in other states, the percentage would have to reach 100%.

<sup>113</sup> See 40 CFR 7.30, 7.35 (stating prohibitions against discrimination).

<sup>114</sup> See section VI (describing analysis for determining whether adverse disparate impact exists).

<sup>115</sup> See section VII.A. (discussing justification).

required to understand whether an adverse impact is created or exacerbated, in determining whether a recipient is in violation of Title VI or EPA’s implementing regulations and the extent of any voluntary compliance measures, the Agency expects to account for the adverse disparate impacts resulting from sources of stressors, the stressors themselves, and/or impacts cognizable under the recipient’s authority.<sup>116</sup>

OCR also expects to base a preliminary finding of noncompliance on the results of the adverse disparate impact analysis, and any information submitted by the complainant or recipient, and any defenses presented by the recipient during the investigation. Within 50 calendar days of OCR’s preliminary findings, the recipient may:

- (1) submit a written response demonstrating that the preliminary findings are incorrect;
- (2) agree to OCR’s recommendations for voluntary compliance; or
- (3) argue that compliance may be achieved through steps other than those recommended by OCR.<sup>117</sup>

If the recipient does not take one of these actions, EPA’s Title VI regulations require OCR to send a formal written determination of noncompliance to the recipient, the Award Official, and the Assistant Attorney General.<sup>118</sup> If the recipient does not voluntarily comply within 10 calendar days of receipt of the formal determination of noncompliance, OCR must start proceedings to deny, annul, suspend, or terminate EPA assistance.<sup>119</sup> Recognizing that elimination of adverse disparate impacts within 10 days may not be achievable; therefore, OCR may postpone proceedings to deny, annul, suspend, or terminate EPA assistance, if the recipient has demonstrated a good faith effort (*e.g.*, signed a voluntary compliance agreement) to come into compliance.

#### **A. Justification**

The recipient will have the opportunity to “justify” the decision to issue the permit notwithstanding the adverse disparate impact, based on a substantial, legitimate justification.<sup>120</sup>

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<sup>116</sup> See section VI.B.2. (discussing defining the scope of an investigation)

<sup>117</sup> 40 CFR 7.115(c), (d).

<sup>118</sup> 40 CFR 7.115(d).

<sup>119</sup> 40 CFR 7.115(e), 7.130(b).

<sup>120</sup> In some circumstances, recipients may justify adverse disparate impacts under Title VI as described in the text. This guidance, however, does not concern justifications for any violations of environmental law.

The recipient may offer its justification following its receipt of the notice of complaint,<sup>121</sup> or after a preliminary finding of non-compliance with Title VI or EPA's implementing regulations.<sup>122</sup>

### ***1. Types of Justification***

Determining what constitutes an acceptable justification will necessarily be based on the facts of the case. Generally, the recipient would attempt to show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission.<sup>123</sup> For example, because recipients are environmental permitting agencies, OCR expects to consider provision of public health or environmental benefits (*e.g.*, waste water treatment plant) to the affected population from the permitting action to be an acceptable justification because such benefits are generally legitimate, important, and integral to the recipient's mission.

In addition, OCR would also likely consider broader interests, such as economic development, from the permitting action to be an acceptable justification, if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission. OCR will generally consider not only the recipient's perspective, but the views of the affected community in its assessment of whether the permitted facility, in fact, will provide direct, economic benefits to the community. However, a justification may be rebutted if EPA determines that a less discriminatory alternative exists, as discussed below.

### ***2. Less Discriminatory Alternatives***

Courts have defined the term "less discriminatory alternative" to be an approach that causes less disparate impact than the challenged practice, but is practicable and comparably effective in meeting the needs addressed by the challenged practice.<sup>124</sup> OCR will likely consider cost and technical feasibility in its assessment of the practicability of potential alternatives.

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<sup>121</sup> 40 CFR 7.120(d)(1)(ii).

<sup>122</sup> 40 CFR 7.115(d)(2).

<sup>123</sup> See *Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 929 F. Supp. 583, 593 (D.R.I. 1996), *aff'd on other grounds*, 110 F.3d 2 (1<sup>st</sup> Cir. 1997); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1412-13 (11<sup>th</sup> Cir. 1993); see also *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1328 (3d Cir. 1981).

<sup>124</sup> See *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11<sup>th</sup> Cir. 1985); *Elston*, 997 F.2d at 1413.

Practicable mitigation measures<sup>125</sup> associated with the permitting action could be considered as less discriminatory alternatives, including, in some cases, modifying permit conditions to lessen or eliminate the demonstrated adverse disparate impacts.

### ***3. Voluntary Compliance***

OCR expects to explore a range of possible options to achieve voluntary compliance. Narrowly focused approaches to eliminate or reduce unjustified adverse disparate impacts might deal solely with the permitted activities that triggered a complaint. More broadly focused remedial efforts might deal with the combined impacts of several contributing sources, taking into account their approximate relative contributions. The Agency expects to account for the adverse disparate impacts resulting from factors within the recipient's authority.<sup>126</sup> In addition, the approaches explored may be assessed with respect to implementation considerations such as cost and technical feasibility.

As previously mentioned, it is expected that denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts. Also in some circumstances, such as where OCR's investigation shows that the permit action identified in the complaint clearly leads to a significant decrease in *adverse disparate impacts*, OCR will likely recommended voluntary compliance measures that take this decrease into account. OCR will likely recommend that the recipient focus on other permitted entities and other sources within their authority to eliminate or reduce, to the extent required by Title VI, the adverse disparate impacts of their programs or activities.

### **B. Hearing/Appeal Process**

If compliance with EPA's Title VI regulations cannot be achieved by informal resolution or voluntary compliance, OCR must make a finding of noncompliance.<sup>127</sup> Within 30 days of receipt of the formal finding of noncompliance, the recipient must file a written answer and may request a hearing before an EPA ALJ.<sup>128</sup> If the recipient does not request a hearing, it shall be deemed to have waived its right to a hearing, and OCR's finding will be deemed to be the ALJ's determination.<sup>129</sup> Following receipt of the ALJ's determination, the recipient may, within 30

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<sup>125</sup> For further discussion of potential measures that may reduce or eliminate adverse disparate impacts, *see* section IV.B.

<sup>126</sup> *See* section VI.B.2.a. (discussing the scope of recipient's authority).

<sup>127</sup> 40 CFR 7.115(e); 7.130(b)(1).

<sup>128</sup> 40 CFR 7.130(b)(2)(i), (ii).

<sup>129</sup> 40 CFR 7.130(b)(2)(ii).

days, file its exceptions to that determination with the Administrator.<sup>130</sup> The Administrator may, within 45 days after the ALJ's determination, serve notice that she will review the determination.<sup>131</sup> If the recipient does not file exceptions or if the Administrator does not provide notice of review, the ALJ's determination constitutes the Administrator's final decision.<sup>132</sup> If the Administrator reviews the determination, all parties will be given reasonable opportunity to file written statements.<sup>133</sup> Subsequently, if the Administrator's decides to deny an application, or annul, suspend, or terminate EPA assistance, that decision becomes effective 30 days after the Administrator submits a written report to Congress.<sup>134</sup>

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<sup>130</sup> 40 CFR 7.130(b)(3)(i).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> 40 CFR 7.130(b)(3)(ii).

<sup>134</sup> 40 CFR 7.130(b)(3)(iii).

## APPENDIX A: GLOSSARY OF TERMS

The definitions provided in this glossary only apply to the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* and the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, unless a direct citation to the Code of Federal Regulations (CFR) is provided. Please note that underlined words are ones for which definitions are available in this glossary.

<b><u>Term</u></b>	<b><u>Definition</u></b>
Accuracy	The measure of the correctness of data, as given by the difference between the measured value and the true or standard value.
Adverse Impact	A negative impact that is determined by EPA to be significant, based on comparisons with benchmarks of significance. These benchmarks may be based on law, policy, or science.
Affected Population	A population that is determined to bear an adverse impact from the source(s) at issue.
Ambient Standards	A level of pollutants prescribed by regulations that are not to be exceeded during a given time in a defined area. (e.g., <u>National Ambient Air Quality Standards</u> ).
Ambient	Any unconfined portion of a water body, land area, or the atmosphere, such as the open air or the environment surrounding a source.
Attainment Area	An area considered to have air quality as good as or better than the national ambient air quality standards as defined in the Clean Air Act. An area may be an attainment area for one pollutant and a non-attainment area for others. (See also <u>non-attainment area</u> ).
Benchmark	A value used as a standard for comparison. Several types used in Title VI investigations include benchmarks of exposure level, risk, and significance. (See also <u>RfC</u> , <u>RfD</u> , <u>threshold</u> )
Brownfields	Abandoned, idled, or under-used industrial and commercial facilities/sites where expansion or redevelopment is complicated by real or perceived environmental contamination. They can be in urban, suburban, or rural areas.
Carcinogen	A chemical or other stressor capable of inducing a cancer response.



<b><u>Term</u></b>	<b><u>Definition</u></b>
Chronic Toxicity	The capacity of a substance to cause long-term harmful health effects.
Comparison Population	A population selected for comparison with an affected population in determining whether the affected population is significantly different with respect to demographic characteristics or degree of adverse impact.
Criteria Pollutants	The 1970 Clean Air Act (CAA) required EPA to set National Ambient Air Quality Standards for certain pollutants known to be hazardous to human health. EPA has identified and set standards to protect human health and welfare for six pollutants: ozone, carbon monoxide, particulate matter, sulfur dioxide, lead, and nitrogen oxide. The term, "criteria pollutants" derives from the requirement that EPA must describe the characteristics and potential health and welfare effects of these pollutants in "criteria." <i>See</i> CAA section 108.
Cumulative Exposure	Total exposure to multiple environmental <u>stressors</u> ( <i>e.g.</i> , chemicals), including exposures originating from multiple <u>sources</u> , and traveling via multiple <u>pathways</u> over a period of time.
Cumulative Impact	The harmful health or other effects resulting from <u>cumulative exposure</u> .
Disparity (Disparate Impact)	A measurement of a degree of difference between population groups for the purpose of making a finding under Title VI. Disparities may be measured in terms of the respective composition (demographics) of the groups, and in terms of the respective potential level of <u>exposure</u> , <u>risk</u> or other measure of <u>adverse impact</u> .
Due Weight	The importance or reliance EPA gives to evidence or agreements to reduce impacts provided by recipients or complainants, depending on a review of relevance, scientific validity, completeness, consistency, and uncertainties. Where evidence or agreements prove to be technically satisfactory, OCR may rely upon that information rather than attempting to duplicate the analysis.
Environmental Council of States (ECOS)	The Environmental Council of States (ECOS) is a national non-partisan, nonprofit association of state and territorial environmental commissioners.

<b><u>Term</u></b>	<b><u>Definition</u></b>
Exposure	Contact with, or being subject to the action or influence of, environmental <u>stressors</u> , usually through ingestion, inhalation, or dermal contact.
Exposure Pathway	The physical course a chemical or other <u>stressor</u> takes from its source to the exposed <u>receptor</u> ( <i>See also</i> <u>Exposure Route</u> ).
Exposure Route	The avenue by which a chemical or other <u>stressor</u> comes into contact with an organism ( <i>e.g.</i> , inhalation, ingestion, dermal contact).
Exposure Scenario	A set of facts, assumptions, and inferences about how <u>exposure</u> takes place that aids in evaluating, estimating, or quantifying <u>exposures</u> ( <i>e.g.</i> , <u>exposure pathway</u> , environmental conditions, time period of exposure, <u>receptor lifetime</u> , average body weight).
Financial Assistance	Any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which EPA provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of personnel; or (3) Real or personal property or any interest in or use of such property, including: <ul style="list-style-type: none"> <li>(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and</li> <li>(ii) Proceeds from a subsequent transfer or lease of such property if EPA's share of its fair market value is not returned to EPA.</li> </ul> 40 CFR 7.25.
General population	A comparison population that consists of the total set of persons in a jurisdiction or area of potential impact, including an <u>affected population</u> .
GIS (Geographic Information System)	An organized computer system designed to efficiently capture, analyze, and display information in a geographically referenced manner, such as a map. Commonly, GIS is used to produce maps which combine various data and analysis results together, allowing for convenient visual analysis.
Hazard	The degree of potential for a <u>stressor</u> to cause illness or injury in a <u>receptor</u> , or the inherent toxicity of a compound.

<b><u>Term</u></b>	<b><u>Definition</u></b>
Hazard Index	A summation of <u>hazard quotients</u> for multiple chemicals; a measure of cumulative risk for <u>substances which exhibit a threshold</u> for toxicity.
Hazard Quotient	The ratio of a single substance exposure level to a <u>reference dose or benchmark</u> for that substance. An exposure at the <u>same concentration as the reference dose</u> would have a hazard quotient of 1.
Hazardous Air Pollutant (HAP)	Air toxics which have been specifically listed for regulation under Clean Air Act section 112.
Health Outcome	A measure of disease rate or similar impact, such as age-adjusted cancer death rate.
Impact	In the health and environmental context, a negative or harmful effect on a receptor resulting from <u>exposure</u> to a stressor ( <i>e.g.</i> , a case of disease). The likelihood of <u>occurrence</u> and severity of the impact may depend on the magnitude and frequency of exposure, and other factors affecting toxicity and receptor sensitivity.
Informal Resolution	Any settlement of complaint allegations prior to the issuance of a formal finding of noncompliance by EPA.
Measure of Impact	A measure used in evaluating the significance of an impact, which may involve the general likelihood, frequency, rate or number of instances of the occurrence of an impact. ( <i>See risk</i> , which is similar, but expressed as a numeric probability of occurrence)
Media or Medium	Specific environmental compartments such as air, water, or soil, that are the subject of regulatory concern and activities.
Mitigation	Measures taken to reduce or eliminate the intensity, severity or frequency of an adverse disparate impact.
Mobile Source	Any non-stationary source of air pollution such as cars, trucks, motorcycles, buses, airplanes, ships or locomotives.
Model/Modeling/Modeled	A set of procedures or equations (usually computerized) for estimating or predicting a value, <i>e.g.</i> , the ambient environmental concentration of a stressor. <i>Also</i> , the act of using a model.

<b><u>Term</u></b>	<b><u>Definition</u></b>
National Ambient Air Quality Standards (NAAQS)	Standards established by EPA pursuant to Clean Air Act section 109 that apply for outdoor air throughout the country. ( <i>See <u>criteria pollutants</u></i> )
New Permit	For the purposes of this guidance, the term “new permits” refers to the initial issuance of any permit, including permits for (1) the construction of a new facility, (2) the continued operation of an existing facility that previously operated without that type of permit, and (3) an existing facility that adds a new operation that would require a new type of permit ( <i>e.g.</i> , newly issued water discharge permit), in addition to the facility's existing permits ( <i>e.g.</i> , existing air emission permit). ( <i>See <u>permit</u></i> ).
Non-affected population	The remainder of a <u>general population</u> which is not found to be part of an <u>affected population</u> ( <i>e.g.</i> , a county population minus those in an <u>affected population</u> ).
Non-Attainment Area	Area that does not meet one or more of the National Ambient Air Quality Standards for the criteria pollutants designated in the Clean Air Act.
Non-Point Source	A diffuse water pollution source ( <i>i.e.</i> , without a single point of discharge to the environment). Common non-point sources include agricultural, forestry, mining, or construction areas, areas used for land disposal, and areas where collective pollution due to everyday use can be washed off by precipitation, such as city streets. ( <i>See also <u>point source</u></i> ).
Noncompliance	A finding by EPA that a recipient’s program or activities do not meet the requirements of EPA’s Title VI implementing regulations.
Offsets	A concept whereby emissions from proposed new or modified stationary sources are balanced by reductions from existing sources to stabilize total emissions.
Pathway (exposure)	The physical course a chemical or other stressor takes from its source to the exposed <u>receptor</u> ( <i>See also <u>Exposure Route</u></i> ).

<b><u>Term</u></b>	<b><u>Definition</u></b>
Pattern (of disparate impact)	An allegation or finding that multiple sources of a certain type are consistently associated with likely adverse impacts to a protected group.
Permit	An authorization, license, or equivalent control document issued by EPA or other agency to implement the requirements of an environmental regulation ( <i>e.g.</i> , a permit to operate a wastewater treatment plant or to operate a facility that may generate harmful emissions).
Plain Language Action Network	Plain Language Action Network (PLAN) is a government-wide group working to improve communications from the federal government to the public.
Point Source	A stationary location or fixed facility from which pollutants are discharged; any single identifiable source of a stressor ( <i>e.g.</i> , a pipe, ditch, small land area, pit, stack, vent, building).
Pollution Prevention	The practice of identifying areas, processes, and activities that create excessive waste products or stressors, and reducing or preventing them from occurring through altering or eliminating a process or activity.
Potency factor	A measure of the power of a toxic <u>stressors</u> to cause harm at various levels of <u>exposure</u> (sometimes based on the slope of a dose-response curve), or above a single specific value.
Receptor	An individual or group that may be exposed to <u>stressors</u> .
Recipient	Any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. 40 CFR 7.25.
Reference area	An area from which one or more comparison populations are drawn for conducting a disparity analysis.
Reference dose	<i>See</i> <u>RfC</u> and <u>RfD</u> .

<b><u>Term</u></b>	<b><u>Definition</u></b>
Release	The introduction of a <u>stressor</u> to the environment, where it may come in contact with <u>receptors</u> . Includes, among other things, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.
RfC (inhalation reference concentration)	An estimate (with uncertainty spanning perhaps an order of magnitude) of the daily <u>exposure</u> of the human population to a chemical, through <u>inhalation</u> , that is likely to be without risk of harmful effects during a lifetime.
RfD (oral reference dose)	An estimate (with uncertainty spanning perhaps an order of magnitude) of the daily <u>exposure</u> of the human population to a chemical, through <u>ingestion</u> , that is likely to be without risk of harmful effects during a lifetime.
Risk	A measure of the probability that damage to life, health, property, and/or the environment will occur as a result of a given hazard. In quantitative terms, risk is often expressed in values ranging from zero (representing the certainty that harm will not occur) to one (representing the certainty that harm will occur). The following are examples showing the manner in which cancer risk is expressed: E-4 = $1 \text{ in } 10^{-4}$ , or a risk of 1 in 10,000; E-5 = a risk of 1/100,000; E-6 = a risk of 1/1,000,000. Similarly, $1.3\text{E-}3$ = a risk of $1.3/1000 = 1$ chance in 770.
Risk Assessment	Qualitative and quantitative evaluation of the risk posed to human health and/or the environment by the actual or potential presence and/or use of specific <u>stressors</u> . This involves a determination of the kind and degree of <u>hazard</u> posed by a stressor ( <i>e.g.</i> , <u>toxicity</u> ), the extent to which a <u>particular</u> group of people has been or may be exposed to the agent, and the present or potential health risk that exists due to the agent.
Science Advisory Board (SAB)	A group of external scientists who advise EPA on science and policy.
Significant	A determination that an observed value is sufficiently large and meaningful to warrant some action. ( <i>See</i> <u>statistical significance</u> ).

<b><u>Term</u></b>	<b><u>Definition</u></b>
Source	The site, facility, or origin from which one or more environmental stressors originate ( <i>e.g.</i> , factory, incinerator, landfill, storage tank, field, vehicle)
Statistical significance	An inference that there is a low probability that the observed difference in measured or estimated quantities is due to variability in the measurement technique, rather than due to an actual difference in the quantities themselves.
Stressor	Any factor that may adversely affect <u>receptors</u> , including chemical ( <i>e.g.</i> , <u>criteria pollutants</u> , toxic contaminants), physical ( <i>e.g.</i> , noise, extreme temperatures, fire) and biological ( <i>e.g.</i> , disease pathogens or parasites). Generally, any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems. Airborne stressors may fall into two main groups: (1) those emitted directly from identifiable sources and (2) those produced in the air by interaction between chemicals ( <i>e.g.</i> , most ozone).
Threshold	The dose or <u>exposure</u> level below which an adverse impact is not expected. Most carcinogens are thought to be non-threshold chemicals, to which no exposure can be presumed to be without some risk of contracting the disease.
Toxicity	The degree to which a substance or mixture of substances can harm humans or animals. ( <i>See</i> <u>chronic toxicity</u> )
Unit risk factor	A measure of the power of a toxic <u>stressor</u> to cause cancer at various levels of <u>exposure</u> (based on the slope of a dose-response curve, combined with an <u>exposure scenario</u> ).
Universe of Sources	A category of relevant and/or nearby sources of similar <u>stressors</u> to those from the permitted activity included in assessments of potential <u>adverse disparate impacts</u> .
Voluntary Compliance	Settlement between EPA and a recipient after a formal finding of noncompliance.

## APPENDIX B: TITLE VI COMPLAINT PROCESS FLOW CHART

### TITLE VI COMPLAINT PROCESS 40 CFR Part 7

\*All days are measured  
by calendar days.

